

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 619

STEVE ASHTON, PETITIONER,

vs.

KENTUCKY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE COMMONWEALTH OF KENTUCKY

## INDEX

|  | Original | Print |
|--|----------|-------|
| Record from the Perry Circuit Court, Commonwealth of Kentucky                            |          |       |
| Indictment   | 1        | 1     |
| Motion to dismiss indictment   | 3        | 3     |
| Amended motion to dismiss indictment   | 5        | 4     |
| Response to motion and amended motion to dismiss indictment                              | 7        | 5     |
| Motion for the return of seized property and the suppression of evidence                 | 9        | 5     |
| Affidavit of Dan Jack Combs  | 10       | 6     |
| Motion for bill of particulars   | 11       | 7     |
| Minute entry of first trial of September 10, 1963  | 13       | 7     |
| Minute entry of second trial of November 21, 1963  | 14       | 8     |
| Motion for arrest of judgment  | 16       | 9     |
| Motion for new trial   | 18       | 10    |
| Notice of appeal   | 20       | 11    |
| Order overruling motion for arrest of judgment, for new trial and for arrest of judgment | 22       | 12    |

|  | Original | Print |
|--|----------|-------|
| Record from the Perry Circuit Court, Commonwealth of Kentucky—Continued            |          |       |
| Motion to extend time to file record .....   | 23       | 13    |
| Order extending time to file record .....  | 24       | 13    |
| Designation of contents of record on appeal .....                                  | 25       | 14    |
| Clerk's certificate (omitted in printing) .....                                    | 27       | 15    |
| Transcript of evidence on first trial resulting in hung jury (omitted in printing) |          |       |
| Transcript of evidence of trial of November 21, 1963 .....                         | 203      | 15    |
| Appearances .....  | 203      | 16    |
| Motion to amend indictment and allowance thereof .....                             | 203a     | 16    |
| Opening statement to the jury by Mr. Combs   | 269      | 16    |
| Testimony of Sam L. Luttrell—  |          |       |
| direct .....   | 271      | 18    |
| cross .....  | 292      | 33    |
| redirect .....   | 308      | 46    |
| recross .....  | 309      | 47    |
| Mrs. W. P. Nolan—  |          |       |
| direct .....   | 310      | 48    |
| cross .....  | 318      | 54    |
| Charles E. Combs—  |          |       |
| direct .....   | 338      | 70    |
| cross .....  | 344      | 74    |
| C. W. Begley—  |          |       |
| direct .....   | 352      | 79    |
| cross .....  | 354      | 81    |
| redirect .....   | 359      | 86    |
| recross .....  | 360      | 86    |
| Anderson Asher—  |          |       |
| direct .....   | 360      | 87    |
| cross .....  | 362      | 88    |
| redirect .....   | 365      | 91    |
| recross .....  | 365      | 91    |
| redirect .....   | 366      | 92    |
| recross .....  | 367      | 93    |
| Motion for judgment of acquittal and denial thereof .....                          | 368      | 93    |

|   | Original | Print |
|---|----------|-------|
| Record from the Perry Circuit Court, Commonwealth of Kentucky—Continued   |          |       |
| Transcript of evidence of trial of November 21, 1963—Continued  |          |       |
| Opening statement to jury on behalf of the defendant .....  | 376      | 99    |
| Testimony of Mrs. Sylvia Ashton—  |          |       |
| direct .....  | 378      | 100   |
| cross .....   | 380      | 102   |
| redirect .....  | 387      | 107   |
| recross .....   | 387      | 108   |
| Ira Kilburn—  |          |       |
| direct .....  | 388      | 109   |
| Garret White—   |          |       |
| direct .....  | 390      | 110   |
| cross .....   | 393      | 112   |
| redirect .....  | 395      | 114   |
| Charles Moore—  |          |       |
| direct .....  | 395      | 114   |
| cross .....   | 398      | 116   |
| redirect .....  | 400      | 118   |
| Sam L. Luttrell—  |          |       |
| (recalled)—   |          |       |
| redirect .....  | 401      | 119   |
| recross .....   | 403      | 120   |
| Colloquy between Court and counsel re instructions .....  | 404      | 121   |
| Commonwealth's Exhibit 1—"Notes on a Mountain Strike", Letter from The Roving Pickets of Southeastern Kentucky to "Dear Friend and Brother" and "The Miner's Voice" ..... | 410A     | 127   |
| Proceedings in the Court of Appeals of the Commonwealth of Kentucky .....   | 412      | 144   |
| Opinion and Order .....   | 412      | 144   |
| Clerk's certificate (omitted in printing) .....   | 428      | 158   |
| Order extending time to file petition for writ of certiorari .....  | 429      | 159   |
| Order allowing certiorari .....   | 430      | 160   |

[fol. 1]

**IN THE PERRY CIRCUIT COURT  
COMMONWEALTH OF KENTUCKY**

INDICTMENT—June 21, 1963

Came this day the Grand Jury of Perry County into open Court and answered to the call of their names and through their foreman of the Grand Jury reported the following indictment against *Steve Ashton*, charging him with the crime of *Criminal Libel*, said indictment was indorsed a true bill by the foreman of the Grand Jury in the presence of the Grand Jury and handed to the Clerk of this Court who marked same filed as the law directs.

#1456.

Criminal Order Book S, page 403

PERRY CIRCUIT COURT

No. ....

KRS 431.075

COMMONWEALTH OF KENTUCKY.

vs.

STEVE ASHTON.

The grand jury charges:

On or about the 22nd day of March, 1963, in Perry County, Kentucky, the above named defendant committed the offense of criminal libel, by publishing a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs, Mr. and Mrs. W. P.

Nolan, against the peace and dignity of the Commonwealth of Kentucky.

A True Bill

P. L. Johnson, Foreman.

(On back of indictment)

[fol. 2] Witnesses:

Sam L. Luttrell, Charles E. Combs, Mr. & Mrs. W. P. Nolan, Hazard, Kentucky.

No. 1456

---

COMMONWEALTH OF KENTUCKY,

vs.

STEVE ASHTON.

---

INDICTMENT FOR CRIMINAL LIBEL

A True Bill

P. L. Johnson, Foreman of Grand Jury.

Presented by the foreman, in the presence of the Grand Jury, to the Court and filed in open Court, this 21st day of June, 1963.

Grace Holliday Strong, Clerk, Perry Circuit Court.

[fol. 3]

IN THE PERRY CIRCUIT COURT

---

COMMONWEALTH OF KENTUCKY, Plaintiff,

v.

STEVE ASHTON, Defendant.

---

MOTION TO DISMISS INDICTMENT—Filed June 24, 1963

Comes defendant, by counsel, and pursuant to R.Cr. 812-18 respectfully moves the Court to dismiss the indictment returned herein and as grounds therefor, says that:

(1) The indictment does not state facts sufficient to constitute an offense against the laws of the Commonwealth of Kentucky.

(2) The wording of the indictment is so vague and uncertain that it fails to meet the constitutional requirements in that it fails to properly apprise the defendant by describing the essential facts constituting the specific [fol. 4] offense with which he is charged.

(3) The indictment is defect inasmuch as it fails to comply with the requirements of R.Cr. 610 (2) and the substantive laws of the Commonwealth of Kentucky.

Wherefore, defendant demands an order dismissing the indictment herein.

Dan Jack Combs, Pikeville, Kentucky, Attorney for Defendant.

Certificate of Service (omitted in printing).

*Rules of Criminal Procedure*

[fol. 5]

IN THE PERRY CIRCUIT COURT

[Title omitted]

AMENDED MOTION TO DISMISS INDICTMENT—

Filed July 31, 1963

I.

Comes defendant, by counsel, and amends his original motion to dismiss heretofore filed herein and for his amendment says that he reiterates and adopts by reference the same as if copies and set out at length herein the allegations set forth in his original motion.

II.

For further amendment defendant says that the charge set forth in the indictment if sustained would violate rights guaranteed the defendant by the First Amendment and Section 1 and 2 of the Fourteenth Amendment to the Constitution of the United States and would further violate Section One (4) and Section Eight of the Constitution of the Commonwealth of Kentucky.

[fol. 6] Wherefore, defendant demands as in his original motion.

Dan Jack Combs, Pikeville, Kentucky, Attorney for  
Defendant.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol.7]

## IN THE PERRY CIRCUIT COURT

[Title omitted]

RESPONSE TO MOTION AND AMENDED MOTION TO DISMISS  
INDICTMENT—Filed August 7, 1963

Comes now the Commonwealth of Kentucky, by counsel, and denies the allegations set forth in Paragraph 1, 2 and 3 of defendant's original motion to dismiss the indictment.

For further response to defendant's amended motion to dismiss the indictment, the Commonwealth of Kentucky states, in response to paragraph 2, that it is true the defendant has certain inherent and inalienable rights to freely and fully speak, write and print on any subject. However, such person is responsible for the abuse of that liberty.

Wherefore, the plaintiff, Commonwealth of Kentucky, prays that the defendant's motion and amended motion to dismiss the indictment be dismissed.

Tolbert Combs, Commonwealth Attorney, 33rd Judicial District, Hazard, Kentucky.

[fol. 8]

[File endorsement omitted]

[fol. 9]

## IN THE PERRY CIRCUIT COURT

[Title omitted]

MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE  
SUPPRESSION OF EVIDENCE—Filed September 9, 1963

Defendant hereby moves the Court to direct that certain property of which he is the owner, be returned to him, to-wit:

Numerous ten page papers entitled "notes on a mountain strike" dated March 22, 1963, and which property was unlawfully seized and taken from him by policemen for

the City of Hazard on or about March 23, 1963. Defendant says the true names of the policemen are unknown to him.

The defendant further moves the Court for the entry of an order directing said Officers to return to him said property and that it be suppressed as evidence against him in any criminal proceeding.

The defendant says the property was seized against his will and without search warrant.

Wherefore, defendant prays proper orders of the Court.

Dan Jack Combs, Attorney for Defendant, Pikeville,  
Kentucky.

[fol. 9B] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 10]

IN THE PERRY CIRCUIT COURT

[Title omitted]

AFFIDAVIT OF DAN JACK COMBS—Filed September 9, 1963

Affiant, Dan Jack Combs, after being first duly sworn deposes and says:

That he is the Attorney of Record for the defendant, Steve Ashton.

Says that it is necessary to obtain answers to the questions and requests set forth in the attached Bill of Particulars in order to provide him with information fairly necessary to enable the accused and his counsel to understand and prepare his defense against the charge set forth in the indictment.

Further affiant sayeth not.

Dan Jack Combs, Affiant.

[File endorsement omitted]

[fol. 11] Subscribed and sworn to before me by Dan Jack Combs, this September 9, 1963.

Theda B. Cobles, Notary Public, Kentucky, State at  
Large.

[File endorsement omitted]

IN THE PERRY CIRCUIT COURT

MOTION FOR BILL OF PARTICULARS—Filed September 9, 1963

The defendant moves that the Commonwealth be directed to furnish him a Bill of Particulars with reference to the indictment herein so as to:

1. Set forth the dates of publication of the alleged libelous material, in detail.

2. To whom it was published, and the manner of publication.

3. An enumeration of the matter alleged to be false and each respect wherein such matters are claimed to be false.

[fol. 12] 4. The elements of the common law crime of libel and whether or not the Commonwealth proposes to carry the burden of proof as to each element.

5. Whether or not Commonwealth considers the element of malice, knowledge, intent and falsity of the alleged libelous matters as elements of this crime and whether or not the Commonwealth considers it incumbent upon it to carry the burden of each of these elements.

The supporting affidavit of defendant's counsel is attached hereto.

Dan Jack Combs, Attorney for Defendant, Pikeville, Kentucky.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 13]

IN THE PERRY CIRCUIT COURT

MINUTE ENTRY OF FIRST TRIAL—September 10, 1963

This cause came on for trial. Came then the Attorney for the Commonwealth and announced ready. Came the defendant, by counsel, and announced ready. Whereupon came the following jury, to-wit; Henry Nunn, Reader Homes, Floyd Mullins, Arcel Huff, Lena Burton, Jessie Bryant,

Bigge Sizemore, Kermit Roark, Galley Collins, W. M. Miller, Jack Davidson, Brit Brashear, who qualified and were accepted by both the Commonwealth and the Defendant.

Came then the defendant, and waived formal arraignment and entered his plea of not guilty to the charge in the indictment. The jury was then sworn by the Court to well and truly try the issues joined and a true verdict render. Came then the Attorney for the Commonwealth and read the indictment to the jury and made statement. Came then the Commonwealth and introduced its evidence and closed; The Defendant, by counsel, made statement and introduced his evidence and closed. The jury was then instructed by the Court as to the law in the case. The jury then retired and after due deliberation reported into open Court that it was unable to reach a verdict. The Court then discharged the jury and ordered that this case be continued to the November Term of the Perry Circuit Court.

B. Robert Stivers, Special Judge.

---

[fol. 14]

#### IN THE PERRY CIRCUIT COURT

[Title omitted]

#### MINUTE ENTRY OF SECOND TRIAL—November 21, 1963

This cause came on for trial. Came then the Attorney for the Commonwealth and announced ready. Came the defendant, by counsel, and announced ready. Whereupon came the following jury, to wit: Eliza Oliver, Mrs. Ben Napier, Dora Ingram, Mrs. Tom Jent, Mrs. Hershel Cornett, Beatrice Caudill, Gladys Cox, Zola Ferguson, Lucy Gabbard, Ella Golubie, Everett Allen and Carlo Hogg, who qualified and were accepted by both the Commonwealth and the Defendant.

Came then the Defendant and waived formal arraignment and entered his plea of not guilty to the charge in the indictment. The jury was then sworn by the Court to well

and truly try the issues joined and a true verdict render. Came then the Attorney for the Commonwealth and read the indictment to the jury and made statement. Came then the Commonwealth and introduced its evidence and closed. Came then the Defendant, by counsel, and reserved his statement and introduced its evidence. The jury was then instructed by the Court as to the law in the case and after hearing argument of counsel, retired and after due deliberation reported into open Court the following verdict:

[fol. 15] "We the jury do agree and find the Defendant guilty and fix his punishment at \$3,000.00 and 6 months prison."

Mrs. J. B. Gabbard, Ella W. Golubic, Mrs. Ben Napier, Mrs. Beatrice Caudill, Mrs. Zola Ferguson, Mrs. Herschel Cornett, Dora Ingram, Eliza Oliver, Dicie Jent, Carlo Hogg.

The Defendant was then delivered to the Jailer of Perry County to await the judgment of the Court.

[fol. 16]

---

IN THE PERRY CIRCUIT COURT

[Title omitted]

MOTION FOR ARREST OF JUDGMENT—Filed  
November 26, 1963

Comes defendant, by counsel, and moves the Court to arrest the judgment for the following reasons:

(1) The indictment does not state facts sufficient to constitute an offense against the laws of the Commonwealth of Kentucky.

(2) Alternatively that the indictment, if sufficient to state an offense against the laws of the Commonwealth of [fol. 17] Kentucky, prosecution for such an offense would violate the rights guaranteed the defendant by the Constitution of the United States of America and the Constitution

of the Commonwealth of Kentucky as was alleged in defendant's original and amended motions to dismiss, the indictment filed herein, said motions are made a part hereof, the same as if copies and set out at length herein.

Dan Jack Combs, Pikeville, Kentucky, Attorney for Defendant.

[File endorsement omitted]

Certification of Service (omitted in printing).

---

[fol. 18]

IN THE PERRY CIRCUIT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed November 26, 1963

Comes defendant, by counsel, and moves the Court to grant him a new trial for the following reasons:

(1) The Court erred in denying defendant's motion for judgment of acquittal.

(2) The verdict is contrary to the weight of the evidence.

(3) The verdict is not supported by substantial evidence.

(4) The Court erred in admitting testimony of the witnesses, Bud Luttrell, Charles Combs and Mrs. W. P. Nolan, to which objections were made.

(5) The Court erred in instructing the jury, in that the instructions unduly reiterated the alleged libelous material.

(6) The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances.

The attorney for the Commonwealth states in his closing argument:

(a) Repeatedly referred to the trial jurors by their first names;

(b) Repeated references to the fact that defendant would return to New York and that they, the jurors, would re-

main in Perry County, impliedly under the influence and authority of the Sheriff of Perry County and the Chief of Police of Hazard.

[fol. 19] (c) Repeatedly referred to defendant as a "rat" and a "rascal";

(d) Though not supported by any evidence repeatedly injected into the argument defendant's former opposition to the House on Unamerican Activities Committee;

(e) Repeatedly referring to defendant as a "foreigner" as an "outsider" as a "New Yorker", which references denied defendant of equal protection of the laws;

(f) Repeated exhortation to the jury to bring in a verdict that would in the future regulate the conduct of "outsiders";

(g) By innuendo or obvious implication, attorney for the Commonwealth repeatedly commented on defendant's failure to take the stand in his own behalf.

(7) The Court erred in not sustaining defendant's motion for return of property wrongfully and unlawfully seized, and the suppression of evidence.

(8) The Court erred in not directing the Commonwealth to furnish him with a Bill of Particulars as set forth in motion filed September 9, 1963.

(9) The Court erred in not continuing the case.

Dan Jack Combs, Pikeville, Kentucky, Attorney for Defendant.

[fol. 20] Certification of Service (omitted in printing).

[File endorsement omitted]

---

IN THE PERRY CIRCUIT COURT

[Title omitted]

NOTICE OF APPEAL—Filed November 26, 1963

1. The Appellant is Steve Ashton, who resides at 404 East Ninth Street, New York 9, New York.

2. Appellant's attorney is Dan Jack Combs, of Pikeville, Kentucky.

3. The offense charges is criminal libel ostensibly denounced by KRS 431.075.

[fol. 21] 4. Pursuant to the plea of "not guilty" a jury was impaneled to try the issues on the 21st day of November, 1963, and after long deliberation ten of the twelve jurors returned a verdict finding the defendant guilty, fixing his punishment at six months in prison jail (sic) and \$3,000 fine. Whereupon a judgment in conformity therewith was entered on the 21st day of November, 1963, and recorded in Criminal Order Book 8, page 496, Perry Circuit Court Clerk's Office.

5. The defendant is now on bail.

I, Dan Jack Combs, attorney for the above named defendant, hereby appeal to the Court of Appeals for the Commonwealth of Kentucky from the above stated judgment.

Dan Jack Combs, Pikeville, Kentucky, Attorney for Defendant.

[File endorsement omitted]

Certification of Service (omitted in printing).

[fol. 22]

IN THE PERRY CIRCUIT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR ARREST OF JUDGMENT, FOR NEW TRIAL AND FOR ARREST OF JUDGMENT—November 27, 1963

The defendant, Steve Ashton, in the above styled case having moved the Court for an arrest of judgment and also for a new trial, and the Court having considered both motions, and being advised, is of the opinion that they, and each of them, should be overruled.

It is now ordered and directed by the Court that the defendant's motion for arrest of judgment and also his motion for a new trial be, and they are now, overruled.

To which rulings of the Court the defendant excepts.

This November 27th, 1963.

Courtney C. Wells, Judge, Perry Circuit Court.

---

[fol. 23]

IN THE PERRY CIRCUIT COURT

[Title omitted]

MOTION TO EXTEND TIME TO FILE RECORD—

Filed December 27, 1963

Comes defendant-appellant pursuant to CR 12.58 (1), respectfully moves the Court to extend the time in which to file his record on appeal up to and including March 22, 1964, and as grounds there says that the stenographer cannot transcribe the evidence introduced at the trial within the sixty days permitted by the Rules.

Wherefore, defendant-appellant prays the appropriate order of the Court.

Dan Jack Combs, Pikeville, Ky., Attorney for Defendant-appellant.

[fol. 24] Certificate of Service (omitted in printing).

[File endorsement omitted]

---

IN THE PERRY CIRCUIT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD—

December 27, 1963

This cause coming to be heard on defendant-appellant's Motion filed pursuant to CR 12.58 (1) for an extension of

time up to and including March 22, 1964, and the Court being sufficiently advised, sustains said motion.

It is, therefore, Ordered that defendant-appellant be and he is granted up to and including March 22, 1964 in which to file his record on appeal.

Courtney C. Wells, Judge.

[fol. 25]

IN THE PERRY CIRCUIT COURT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—  
Filed December 27, 1963

Appellant, Steve Ashton, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action.

1. Indictment.
  2. Motion to dismiss indictment.
  3. Amended Motion to Dismiss indictment.
  4. Response to motion and amended motion to dismiss indictment.
  5. Motion for return of seized property and the suppression of evidence.
- [fol. 26]
6. Affidavit and motion for bill of particulars.
  7. Transcript of Evidence of trial on September 10, 1963.
  8. Order showing jury unable to agree on a verdict and reassignment of case for trial.
  9. Transcript of Evidence of trial on November 21, 1963.
  10. Judgment of conviction in Order Book 8, page 496.
  11. Motion and arrest of judgment.
  12. Motion for New Trial.
  13. Notice of appeal filed on November 26, 1963.

14. Order overruling motion for arrest of judgment and new trial.
15. Order extending the time in which to file record on appeal.
16. Narrative statement of the proceedings or bystanders bill.
17. This designation.

Dan Jack Combs, Pikeville, Kentucky, Attorney for defendant-appellant.

I hereby certify that I have mailed a copy of the foregoing Designation to Honorable Tolbert Combs, Commonwealth's Attorney, at Hazard, Kentucky.

This December 26, 1963.

Dan Jack Combs, Attorney for Defendant-appellant.

[File endorsement omitted]

[fol. 27] Clerk's Certificate (omitted in printing).

[fol. 203]

---

IN THE PERRY CIRCUIT COURT

---

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

STEVE ASHTON, Defendant.

---

**Transcript of the Evidence**

Be It Remembered:

That the above styled cause came on for trial in the Perry Circuit Court on this the 21st day of November, 1963, before Honorable Courtney C. Wells, Regular Judge, and a jury duly empaneled, and the following proceedings were had, to-wit:

**APPEARANCES:**

The plaintiff, the Commonwealth of Kentucky, was represented by Hon. Tolbert Combs, Commonwealth's Attorney, Hazard, Kentucky.

The defendant, Steve Ashton, was represented by Hon. Dan Jack Combs, Attorney, Pikeville, Kentucky.

Thereupon, the reporter was asked to report the voir dire examination, which appears as follows:

[fol. 203a] (Reporter's note: Thereupon came the attorney for the Commonwealth and made the following motion:)

**MOTION TO AMEND INDICTMENT AND ALLOWANCE THEREOF**

Mr. Combs: Comes the Commonwealth and moves the Court to amend the indictment to read; "The above named defendant committed the malicious offense of criminal libel by publishing a false and malicious publication under Section 6.16, which tends to degrade or injure Sam L. Luttrell, Charles E. Combs, Mr. and Mrs. W. P. Nolan.

The Court: Motion sustained.

(To which ruling of the Court, Counsel for the defendant excepts).

\* \* \* \* \*

[fol. 269]

**OPENING STATEMENT TO THE JURY BY MR. COMBS:**

May it please the Court, and you ladies and gentlemen of the jury:

I'll read you the indictment in this case:

**"PERRY CIRCUIT COURT**

Commonwealth of Kentucky

vs;

Steve Ashton

The Grand Jury charges that on or about the 22nd day of March, 1963, in Perry County, Kentucky, the above

named defendant committed the malicious offense of criminal libel by publishing a false and malicious publication tending to degrade or injure Sam L. Luttrell, Charles E. Combs, Mr. and Mrs. W. P. Nolan, against the peace and dignity of the Commonwealth of Kentucky."

Signed a true bill by the foreman of the Grand Jury, P. L. Johnson.

And on the face of the indictment we have: "The Commonwealth of Kentucky. Indictment for Criminal Libel against Steve Ashton.

And again signed a true bill by the foreman of the Grand Jury, P. L. Johnson, and presented by the foreman in the presence of the Grand Jury and filed in open court, on the 21st day of June, 1963.

Signed: Grace Holliday Strong, Clerk of the Perry Circuit Court."

Now, Ladies and Gentlemen of the Jury, I will relate to you substantially what proof the Commonwealth of Kentucky will introduce to you here to substantiate these charges.

Some time ago, you all remember, you are all natives of [fol. 270] our county here, there was some confusion, or unrest, or labor trouble, or whatever you want to call it. We all know about that. It existed here, and we read about it, and we saw it, and it was talked about.

During that time, Steve Ashton came from New York, by way of Ohio, down to this county here, and, so far as I know, he had never been in Perry County before in his life, and while here, he went to the home and the beer tavern of Herbert Stacy down here at the mouth of Allais Holler, off of Highway 15 as you go out of Hazare, who was participating in the picket line. His home is there in this one building in the back, and his beer business was in the front.

While there he typed up a pamphlet, which will be introduced here in evidence. He mimeographed it, prepared it, and stapled it together, and addressed many of them to various people which will be introduced to you here in evi-

dence, and in that pamphlet, he made certain statements that will be read to you, and will be filed in evidence here, and you will have permission, and you can take this pamphlet back to your jury room when this case is finally submitted to you and instructions given you by the court, and read them for yourself, so that there will be no mistake about it.

These statements are degrading, defamatory, and of ill repute against Charlie Combs, Sam Luttrell and Mr. and Mrs. Nolan. Those statements will be read to you. That is the basis for this indictment of criminal libel.

Now, I'm sure that after you have heard all this evidence that you can and will arrive at a fair and just verdict in [fol. 271] this case.

I know that you are going to listen intently to it, and I want you to do that, and when you have heard all this evidence and you go back to your jury room to deliberate, I think you can and you will return into this court room a fair and just verdict, which is all the Commonwealth of Kentucky is asking for in this case, or in any other case.

I thank you very much.

The Court: You may state the case on behalf of the defendant.

Mr. Combs: If your Honor please, I would like to reserve defendant's statement until the completion of the evidence on behalf of the Commonwealth.

The Court: All right. Call the first witness on behalf of the Commonwealth.

Mr. Combs (Tolbert): We would like to call Sam L. Luttrell.

---

The witness, SAM L. LUTTRELL, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Tolbert Combs:

Q1. Will you state your name to the jury.

A. Sam L. Luttrell.

[fol. 272] Q2. What, Mr. Luttrell, if any, official position do you hold at the present time?

A. Chief of Police.

Q3. Of Hazard, Kentucky?

A. Yes, sir.

Q4. How long have you been Chief of Police?

A. Since 1960.

Q5. Prior to that time were you a patrolman, or policeman, here of the City of Hazard?

A. Yes, sir.

Q6. Exactly how long, Bud, have you been on the police force of the City of Hazard?

A. Since 1951.

Q7. Now, during the month of March of this year did you receive information that there was an individual by the name of Steve Ashton in Hazard, or in this community or locality?

Mr. Dan Jack Combs: Object. It fails in materiality.

The Court: I'll overrule your objection.

(To which ruling of the Court Mr. Combs excepts).

A. Yes, I did.

Q8. Did you hear where he had taken up headquarters?

Mr. Dan Jack Combs: Object.

The Court: Overruled.

(To which ruling of the Court Mr. Combs excepts).

[fol. 273] A. Yes, I did.

Q9. Where was that? Where had he set up his headquarters, Mr. Luttrell?

A. 400 Walker Road.

Q10. Is that in Hazard?

A. Yes, it is.

Q11. Did you make any investigation to find out who this individual was, or get any history of him, where he was from, and so forth?

Mr. Dan Jack Combs: Object.

The Court: I think I'll let him answer yes or no.

(To which ruling of the Court Mr. Combs excepts.)

A. Yes, I found out—

The Court: (Interposing) That's enough now.

Q12. Now, from your investigation as to history, tell the jury just what you found—where he was from?

Mr. Dan Jack Combs: Object.

The Court: I'll sustain that objection. That's hearsay.

Mr. Tolbert Combs: Well, I don't know whether it is hearsay or not. He hasn't answered it.

[fol. 274] The Court: Well, if he knows for a fact.

Mr. Tolbert Combs: I asked him if he knew—if he found out from his investigation as to where. I think he has a right to show what he found from his investigation of this individual.

Mr. Dan Jack Combs: In addition to being hearsay, your Honor, or, perhaps, hearsay, I feel that it is certainly immaterial to the issue at hand.

The Court: I'll stand by my ruling.

(To which ruling of the Court, Mr. Tolbert Combs excepts.)

Q13. Did he or not have an automobile?

A. Yes, he did.

Q14. Did you obtain the license number of that automobile?

Mr. Dan Jack Combs: Object.

The Court: I'll overrule that objection.

(To which ruling of the Court Mr. Combs excepts.)

A. Yes.

Q15. What state was it licensed in?

A. Ohio.

Q16. Did you make a check of that license as to where it was from and where it was issued?

Mr. Dan Jack Combs: Object.

[fol. 275] The Court: Overruled.

(To which ruling of the Court Mr. Combs excepts.)

A. It was an Ohio license. I don't know what county, or where it was issued, but he was a student at Oberlin College, at Leary, Ohio.

Q17. Now, had this defendant, Steve Ashton, been in this locality or this community very long?

A. He came here and stayed a few weeks and left, and then came back.

Q18. Did he or not have any business in this community?

Mr. Dan Jack Combs: Object.

The Court: I'll sustain that objection. How would he know whether he had any business in this community or not?

Mr. Combs: Well, your Honor, he made an investigation.

The Court: He couldn't know whether this man had any business here or not. I'll sustain that objection. He can tell what it is if he knows.

Mr. Tolbert Combs: I asked from your investigation—

The Court: Now, I sustained that objection.

(To which ruling of the Court Mr. Tolbert Combs excepts.)

[fol. 276] Q19. Do you know whether or not he had any type of business in this county?

Mr. Dan Jack Combs: Object.

The Court: I'll sustain that objection. He couldn't know. It would be a matter of conclusion.

(To which ruling of the Court Mr. Tolbert Combs excepts.)

Q20. Did you learn from any source, or receive any information, that he was printing any type of literature and putting out here in Hazard, and in this community?

Mr. Dan Jack Combs: Object.

The Court: I'll overrule that objection.

(To which ruling of the Court Mr. Combs excepts.)

A. I received information that he was here the first time writing a book. Then, later, I received a copy of some of his literature that he had printed.

Mr. Dan Jack Combs: Object and move to strike.  
The Court: Overruled.

(To which ruling of the Court Mr. Combs excepts.)

Well, now, did you receive at any time, after learning [fol. 277] that he was printing the book, or pamphlet, did you see at any time a copy of this literature, particularly pertaining to you in your official capacity, and that of Charlie Combs as Sheriff, and that of the part owner of the Hazard Herald, Mr. or Mr. Nolan?

A. Yes, I did.

Q22. Do you have a copy of that pamphlet, or literature, Mr. Luttrell?

A. I think it's right here.

Q23. Will you tell the Jury how you first come into possession of this pamphlet that you have here?

A. I came on duty one morning about 7:30, and two of the night patrolmen who were just going off duty showed me a copy of this, and said they had—

Mr. Dan Jack Combs: Object.

The Court: Sustained as to what they said.

(To which ruling of the Court Mr. Tolbert Combs excepts.)

A. I learned them—

Q24. (Interposing.) Now, that pamphlet that you have there, does the name of Steve Ashton appear anywhere on it?

A. Yes, it's signed by him. Here is his name. (Witness exhibiting the pamphlet to the jury.)

Mr. Tolbert Combs: Do you want to see this, Mr. Combs?  
Mr. Dan Jack Combs: Yes, I would like to.

(Reporter's note: The pamphlet is handed to Mr. Combs, [fol. 278] and after having been examined by him, is returned to the Commonwealth's Attorney.)

Q25. Now, after receiving that pamphlet, did you read it, Mr. Luttrell?

A. Yes, sir, I did.

Q26. Did it have a reference in there as to you, in your official capacity as Chief of Police of the City of Hazard?

A. Yes, it did.

Q27. Did it have reference in there to Charlie Combs, and to Mrs. Nolan?

A. Yes, it did.

Q28. Now, did you do anything about getting another copy, or copies, of this pamphlet?

A. Yes, sir, I did.

Q29. Well, tell the jury what you did.

A. I told the other officer that was coming on duty to go down there and see if they would give him another copy of it.

Mr. Dan Jack Combs: Object. It is self-serving, your Honor, and out of the presence of the defendant.

The Court: I'll sustain the objection as to what he told the others to do. I'll let him testify as to what they did, if he knows.

Mr. Tolbert Combs: My question was did he do anything to obtain other copies, and he said yes, and I asked him what that was.

The Court: I'll let him say whether or not he sent two [fol. 279] policemen down there to investigate.

Mr. Tolbert Combs: That would be telling what he did.

Q30. Go right ahead then, Bud.

A. I sent the policeman down there to get another copy of it, and see how wide it was being distributed.

Q31. Who did you send down there?

Mr. Dan Jack Combs: If Your Honor please, I would like to object and move to strike that portion of his testimony as to how widely it was being distributed. There is no evidence at this time that it had been distributed.

The Court: I'll sustain that objection.

Mr. Tolbert Combs: Your Honor, we're getting to that.

The Court: Well, when you get to it, all right, but at this point I will sustain the objection and motion.

(To which ruling of the Court Mr. Tolbert Combs excepts.)

Q32. Did you send Anderson Asher down there?

A. Patrolman Asher, yes.

Q33. Now, from your own personal knowledge, did he go down there and receive other copies of this?

A. He went down and brought another copy of it back

Q34. And gave it to you?

A. Yes.

[fol. 280] Q35. Was this the same pamphlet that he brought back that had been previously shown to you by someone else?

A. Yes.

Q36. And did it contain the same subject matter?

A. Yes, it did.

Q37. Now, will you take that pamphlet, Mr. Luttrell, and turn to the page that refers to you—I believe you’ve got it there. I believe it is on page 5. Do you have a copy of that Mr. Combs?

Mr. Dan Jack Combs: You gave me one at the commencement of the last trial.

Q38. Turn to page, 5, and the first paragraph at the top of that page, I wish you would read that first paragraph at the top of page 5,

A. (Witness reading.)

“Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator’s home for \$100 a week. Its against the law for a peace officer to take private jobs.”

Q39. Now, after receiving this, did you do anything in the way of getting a warrant for this defendant for his activities here?

A. Yes, sir, after reading all this material, I contacted the individuals that were mentioned in that, and we met at the police judge's office and obtained warrants for him for criminal libel.

Q40. Now, was this warrant served on him?

A. Yes, it was.

[fol. 281] Q41. Tell the Jury who served the warrant, if you know?

A. I did.

Q42. Was anyone with you?

A. About two or three policemen.

Q43. Now, at the time that you served this warrant, where did you find the defendant, Steve Ashton?

A. He was sitting in Herb Stac's living room.

Q44. Describe Herb' Stacy's home there. Is it a home and beer tavern all in one building? Describe it.

A. The beer tavern is built adjacent to the home. There's a door going out of the tavern into the kitchen, and you can see all the way into the front of the house. Of course, you can come around the house and come into the front from the front porch.

Do you want me to just describe when I served the warrant?

Q45. Well, now, without me having to ask you any questions, I wish you would go ahead and tell these ladies and gentlemen of the Jury just what took place when you undertook to serve this warrant on Mr. Ashton?

A. Well, we parked the car out front and went in the tavern. He wasn't in the tavern, but the door was open and I could see him back in the living room. He was sitting on a little ottoman, or something, and had a coffee table in front of him, and he had all this material stacked up in piles, and he had a stapeler there, and I watched him for a minute, and he was putting them together, and folding them this way (witness demonstrating), and stapeling them together, and then he was sitting there on his knee addressing them, this way (witness demonstrating), addressing them, with a pen, as I walked up.

I asked him if he was Stephen Ashton, and he said yes. I asked him—I told him I had a warrant for his arrest for criminal libel. He said: "What are you talking about?" I [fol. 282] said "This stuff you've got right here in front of you."

He looked right up at me and said: "Why, this don't hurt anybody." And I said "The heck it don't."

I arrested him, and he had a big box there, and I just put all of this material in this big box, about this long and about this wide (witness indicating), and brought him and the material up and booked him into jail.

Q46. The pamphlet that you have there, was that taken at the time?

A. Yes.

Q47. Will you read to the jury the address on that, and the return address, if any?

Mr. Dan Jack Combs: I object. I fail to see the relevancy and the materiality of this. The question, as I understand it, is did this man publish maliciously this material, and is it libelous.

Mr. Tolbert Combs: Your Honor, the return address will show who signed the pamphlet there, and I would like to show the return address.

Mr. Dan Jack Combs: Well, I don't think it is necessary. I would like to show it to the Court. May I approach the bench, your Honor?

The Court: Yes, you may.

(Reporter's note: At this point there is a colloquy at the bench, which was not reported, and after which, the [fol. 283] Court made the following ruling.)

The Court: I'll sustain the objection.

(To which ruling of the Court Mr. Tolbert Combs excepts.)

Q48. Now, Mr. Luttrell, who is that pamphlet signed by, and what address is given?

A. It is signed by Steve Ashton, c/o Teugaloo College, Tougaloo, Mississippi.

Q49. Does that have any notation there on it—any handwriting?

Mr. Dan Jack Combs: Object.

The Court: Sustained.

(To which ruling of the Court the Commonwealth excepts.)

Q50. Will you file that pamphlet, Mr. Luttrell, as a part of your evidence and mark it Commonwealth Exhibit No. 1?

A. Yes.

(Reporter's note: The pamphlet above referred to is filed herewith and made part hereof, and is hereto attached, marked "Commonwealth, Exhibit No. 1" for further identity.)

Q51. Did you obtain a list—a mailing list, at the time you were there with the warrant, Mr. Luttrell?

Mr. Dan Jack Combs: Object.

The Court: Sustained. I'll let him tell whether he knows [fol. 284] if any were mailed or not. The mailing list has nothing to do with this case. If any of them were mailed, and he knows about it, I'll let him tell it.

(To which ruling of the Court the Commonwealth excepts.)

A. He told me—

The Court: Don't tell what he told you now.

Q52. Mr. Luttrell, were there other pamphlets there in his possession that were addressed to different other individuals over the United States?

Mr. Dan Jack Combs: Object.

Mr. Tolbert Combs: He can answer yes or no.

The Court: I'll sustain the objection. It is immaterial unless he knows they were mailed. I'll let him tell any pamphlet that he knows was mailed.

Mr. Tolbert Combs: I think it is competent to show, Your Honor, that there were other pamphlets there addressed to individuals throughout the United States.

The Court: No, I don't think so. It is immaterial, if they were addressed if they weren't sent and the addressees did not get them. I'll let him show, if he can show, if he mailed these out, and who he mailed them to, but the fact [fol. 285] that they were addressed and not mailed is immaterial. It couldn't be criminal libel unless they got them.

(To which ruling of the Court the Commonwealth excepts).

Q53. Well, were there other pamphlets there that were prepared to be mailed.

The Court: You can answer that yes or not.

A. Yes, there was.

Q54. Were there more than one?

A. Yes, there was.

Q55. Could you give the jury some idea of how many there were?

A. I can look at this and tell you exactly. There must have been fifty or sixty that were already addressed.

Q56. Prepared to be mailed?

A. Yes, prepared to be mailed.

Q57. Now, did you have a conversation with the defendant, Steve Ashton, as to whether or not he was going to mail these pamphlets?

Mr. Dan Jack Combs: Object as to what he was going to do.

The Court: I'll sustain that objection. I'll let him say what he has done, but not what he was going to do. You can't hold what a man is going to do against him. It is what he has already done.

(To which ruling of the Court the Commonwealth excepts).

[fol. 286] Q58. Well, did the defendant, Steve Ashton, tell you that these were to be mailed?

Mr. Dan Jack Combs: Object.

The Court: Sustained. I've already ruled on that.

(To which ruling of the Court the Commonwealth excepts).

Q59. Mr. Luttrell, how many copies of this pamphlet had you received before you went down to make this arrest on the warrant?

A. Three (3).

Q60. Now, Mr. Luttrell, is there any truth at all in the statement that it took three men to guard this one city policeman to keep him from being killed, as printed in that pamphlet?

Mr. Dan Jack Combs: Object. It is self-serving.

The Court: Just a minute now. I'll let him answer that.

(To which ruling of the Court counsel for defendant excepts).

A. Absolutely no truth to it whatsoever. It is falsehood from the beginning to the end.

Q61. Now, the pamphlet says there that you had a job paying you a Hundred Dollars per week for guarding an operator's home—it's against the law for peace officers to take private jobs. Is there any truth in that statement?

Mr. Dan Jack Combs: Object. That is self-serving.

[fol. 287] The Court: I'll overrule that objection.

(To which ruling of the Court counsel for defendant excepts).

A. There's absolutely no truth to it whatsoever, and he knew it when he printed it.

Q62. Now, if this young man when he wrote this pamphlet, and if he had given you a copy—had he asked you about it, could he have ascertained the truth from you about this?

Mr. Dan Jack Combs: Object.

The Court: I'll let him answer.

(To which ruling of the Court counsel for the defendant excepts).

A. Absolutely he could have found out if he had wanted to.

Q63. Do you know, Mr. Luttrell, from your own personal knowledge, whether or not the subject matter that was printed in this pamphlet was widely talked here in Hazard?

Mr. Dan Jack Combs: Object.

The Court: Well, do you know of anybody else that got a copy of it except you, and the policemen you sent down there after it?

A. Mrs. Nolan got a copy in her door.

[fol. 288] Mr. Dan Jack Combs: Object to that. There's no evidence that the defendant published it, or circulated it, and move to strike, and it is obviously hearsay.

The Court: Well, the fact that Mrs. Nolan published it has no bearing in this case. She is responsible for that, and not the defendant.

Mr. Tolbert Combs: Mrs. Nolan published what, your Honor?

The Court: I thought he said Mrs. Nolan published it.

Mr. Tolbert Combs: No, he said she received a copy of it.

A. She found a copy of it in her door.

The Court: Well, the fact that she received a copy, and nobody else didn't see it, that isn't libel. It didn't Libel her, unless he shows that somebody else saw it.

Mr. Tolbert Combs: Your Honor, I think he is entitled to answer the question as to whether or not this subject matter concerning him was talked about, and widely talked about here in the City of Hazard.

The Court: I'll let him tell who he heard talk about it.

Q64. Did you hear anyone talk about it, Mr. Luttrell?

[fol. 289] A. Yes, there's a lot of people found out about it, and all. and, of course, naturally, it was being discussed among the people who knew it was being printed—

Mr. Dan Jack Combs: Object. This is a conclusion on the part of the witness.

The Court: Sustained. I'll let him tell who he heard talk about it.

(To which ruling of the Court the Commonwealth excepts).

A. Well, since last March, I can't remember everybody that has talked about it.

The Court: Well, tell us somebody. Just the ones you know about.

A. Well, all the policemen discussed it, and the City Manager, and the City Attorney.

The Court: Now, you are the one that showed it to them aren't you? He didn't show it to them, did he?

A. I don't know whether I—no, he didn't show it to them, I know.

The Court: He didn't show it to them, did he, or did he? I'm asking you, did he show it to them?

A. I don't know whether he did or not. I don't even know whether I showed it to them.

[fol. 290] The Court: I will ask you if it wasn't you who distributed this paper in the City of Hazard instead of the defendant?

A. No entirely, no.

The Court: All right, go ahead.

Q65. Now, Mr. Luttrell, as a police officer with some fourteen years of experience, tell the Jury whether or not this type of article printed would degrade a police officer in the profession of being a police officer of a city?

Mr. Dan Jack Combs: Object. That is a conclusion. This is a matter for the jury to determine.

The Court: I'll let him answer it.

(To which ruling of the court counsel for the Defendant excepts).

A. Yes, it does. Anybody knows that.

Q66. Now, Mr. Luttrell, take this pamphlet again, will you please, and turn to page 5, and will you read the last paragraph on Page 5, starting with the seventh line—"The town newspaper—Will you read that to the jury please?"

A. (Witness reading.)

The town newspaper, the Hazard Herald, has hollered that the "commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of [fol. 291] food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mr. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1,000 of the money has come to the pickets, and none of the food and clothes. They are now either under lock and key still, or have been given out to the scabs and others still."

Q67. Now, will you turn to page 4 of that pamphlet, Mr. Luttrell, and on the seventh line down of the middle paragraph where it says—these men have been threatened—will you read that—the rest of that paragraph—starting there—the high sheriff—about ten lines down, Mr. Luttrell.

A. These men have been threatened—is that where you said first?

Q68. The high sheriff—

A. These men have been threatened and intimidated by operators and their gun-thugs—

Mr. Dan Jack Combs: Object. This is not responsive to the question.

Starting there, Sam, where it says—"The high sheriff,

(Witness reading:)

"The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent court decision he was fined [fol. 292] \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gun-point."

Q70. Now, those paragraphs that you read, Mr. Luttrell, were they identically the same paragraphs as appeared in the three copies of this pamphlet that you had previously received from some source before you went down to make this arrest?

A. Yes.

Q71. And was it on these first three copies that you received that you based your warrant for criminal libel?

A. Yes.

Q72. Of course, all this happened here in Perry County, Kentucky, and in March of 1963?

A. Yes, sir.

Mr. Combs: I believe you can ask him, Mr. Combs.

Cross examination.

By Mr. Dan Jack Combs:

Q1. Sheriff Combs did have an awful lot of deputies back [fol. 293] at that time, didn't he, Bud?

A. Yes, I imagine he had quite a few—not many more than they usually have.

Q2. There was a boy injured in his jail, and as a result of this injury, this boy lost an eye?

Mr. Tolbert Combs: I object, your Honor. Now, that has nothing to do with this case. It is whether or not this boy printed this pamphlet. The Court is holding the Commonwealth to that.

The Court: Now, let's see about that. I'll overrule that objection.

(To which ruling of the Court the Commonwealth excepts).

A. My understanding is that Sheriff Combs wasn't even present when this happened.

Q3. Well, you just answer my question. There was a boy in the jail, custody, and he did lose his eye by a tear gas shell, is this true or false?

A. I don't know whether he lost his eyesight or not. It may have been damaged, but my information was that he was fighting the officers.

Q4. I don't want you to volunteer. I would like, Bud, if you could, just answer my questions.

I believe that the Sheriff at this time had more deputies than Perry County has ever had in the history of the County. Isn't that true, Bud? Wasn't this all common knowledge?

A. I don't know exactly how many the others had, but I know that it's been a policy always if somebody wants to be a deputy sheriff, why, they kind of put 'em on.

Q5. And after this labor unrest commenced—after these [fol. 294] men lost their jobs, he put on a lot more deputies, and all these deputies carried guns, didn't they?

A. Which men lost their jobs?

Q6. These unemployed coal miners, as a result of the mines closing down?

A. I imagine the mines would have been closed down before he went in office.

Q7. When this labor unrest started, he did increase substantially his sheriff's force?

Mr. Tolbert Combs: I object, Your Honor. He hasn't said he knows whether he did or not.

The Court: Well, if he knows, all right. If he doesn't, he can say he doesn't know.

(To which ruling of the Court the Commonwealth excepts).

A. Well, that's one thing I didn't keep up with—his deputies.

Q8. His deputies did carry guns, didn't they?

A. Some of them did.

Q9. And Mr. Combs is a mine operator, and was at this time?

A. I think he is.

Q10. There was a judgment obtained against Charlie Combs in this Court by reason of the injury to this boy, was there not?

A. I think there was, but I don't even know what the amount was.

Q11. Did this boy—

Mr. Combs: I object to what he thinks. Bud, if you know say so, and if you don't know, say so.

[fol. 295] Q12. Do you know whether or not his arms were handcuffed at the time he received these injuries?

A. No, I don't.

Q13. At the time this pamphlet was written, was not the sheriff then—was there not a charge pending against him for manslaughter?

A. I'm not sure.

Q14. You were at the trial?

A. No, I wasn't.

Q15. You were at the trial the last time this case was tried, weren't you?

A. Yes.

Q16. You heard Sheriff Combs admit this, didn't you?

A. Well, I don't know whether I was paying attention when the question was asked or not, but if I was, I'd tell it.

Q17. And at the time this pamphlet was written he was still the sheriff of this county, wasn't he?

A. Yes, he was.

Q18. And he is still the sheriff?

A. Yes.

Q19. And he still has the support of the coal operators in Perry County, doesn't he?

A. I don't know.

Q20. And, of course, the coal operators of this county have much more money than the coal miners?

A. Well, I'd say they do.

Q21. Now, talking about the source from which you got this pamphlet that you have been testifying about. Did you receive one in the mail from Steve Ashton?

[fol. 296] A. No, I did not.

Q22. Did Steve deliver one to you?

A. No, he delivered it to one of my officers.

Mr. Dan Jack Combs: I object and move to strike, as unresponsive and self-serving, that addendum to his answer that he delivered it to one of his officers. He don't know how the officer got it, and it is self-serving.

The Court: If he knows it to be so, and if he saw him deliver it, I'll let him answer.

Q23. You didn't see, or you don't know how, from your own personal knowledge, how the officers came by this pamphlet, did you?

A. No.

The Court: Did you see Steve Ashton deliver a copy of this?

A. No, I didn't, your Honor.

Q24. Now, when you came to work this morning at 7:30, you were on duty?

A. Yes.

Q25. And you were in uniform?

A. Yes.

Q26. And you were in charge of the two officers that you saw early that morning when you came on duty?

A. Yes.

Q27. And they, likewise, were in uniform?

A. Yes.

Q28. And were on duty?

A. No, they were going off at 7:00. They changed shifts at 7:00.

[fol. 297] Q29. They changed before you got there?

A. They were just loafing around there reading that pamphlet.

Q30. Now, this is the first that you had heard of this pamphlet?

A. That's right.

Q31. And, I believe, you sent these officers, one or two, back to Herb Stacy's home, is this correct?

A. Back to his tavern.

Q32. His home and tavern are connected, aren't they?

A. Yes.

Q33. Now, was this man in uniform when you sent him back?

A. Yes.

Q34. And you instructed him to go back and to get additional copies of this pamphlet, did you not?

A. I instructed him to go back and see if they would give him another copy of it.

Q35. Did you tell him to do up and plead for one, or did you tell him to go up as an officer of the law, in uniform, and request a copy of it?

A. I didn't instruct him how to get it. I just told him to go down there and see if he would give him another copy of it. The other group told me they were laying on the table—

Mr. Dan Jack Combs: I object, if your Honor please, to him volunteering information.

The Court: Just answer his questions.

Q36. And then how long had they been gone before he returned?

A. Well, I don't know what time he—he wasn't gone too [fol. 298] awful long.

Q37. About how long, Bud?

A. Well, I understand he had a conversation with Ashton—

Q38. I'm just asking you how long he was gone.

A. Well, I'm trying to come down to the time, what held him up. He was gone approximately forty-five minutes to an hour.

Q39. Between the time you sent him up there, and the time that he returned, who did you call, or contact, about the pamphlet that you had read?

A. I called some of them after he came back with the other copy.

Q40. But did you talk to anyone before you sent him up there to get these other copies?

A. Before I sent him back to get the second one?

Q41. Yes.

A. I don't understand who you mean I talked to.

Q42. Well, did you talk to anyone between the time that you read it, when you came on duty at 7:30, and the time you sent him back to get some more? Now, did you talk to anyone about what you had read in this pamphlet?

A. We just discussed it around there at the station.

Q43. Who's we.

A. George Smith, and me, and the officers.

Q44. Did you call Mr. and Mrs. Nolan? Did you call either one of them?

A. After he came back with the second one.

Q45. Well, I say, up to that point. Before that did you call them?

A. I don't remember whether I called them before or after.

Q46. Did you call Charlie Combs?

A. No, I don't think I did. I may have taken a copy over [fol. 299] there to the office and showed it to him. I'm not sure.

Q47. Now, when you informed the Nolans, what did they say to you?

A. I don't remember.

Q48. Who did you talk to?

A. I just told her to come on up there; that we wanted to get a warrant for him; that I thought—I told her—I told her that we had obtained these copies of this thing, and she said that—

Q49. (Interposing) You had obtained the copies? Is that what you said?

A. We had come into possession of them then.

Q50. But you had really, in fact, obtained them, hadn't you? Through the officers under your command?

A. The officers just picked them up off the desk—I mean, the table there in Stacy's tavern. They were there for anybody to get.

Q51. Now, when did you call Mrs. Nolan and tell her to come down that you were going to get out a warrant?

A. I called her that morning after Asher—I believe, after Asher came back with the second copy.

Q52. About what time was this?

A. I don't remember exactly what time it was. May be around 10:30, or something like that.

Q53. Did she agree to meet you at the Magistrate, or at the City Judge's office?

A. She agreed to come up there.

Q54. And so did Sheriff Combs?

A. Yes.

Q55. And you were there?

A. Yes.

Q56. And the County Attorney was there, or City Attorney?

[fol. 300] A. I think he was there. I'm not sure.

Q57. And you all—all of you, swore out this warrant?

A. Yes.

Q58. And, of course, you read it there in the chambers, or wherever the meeting was held?

A. Yes.

Q59. And the warrants were issued. How many were there—one, two or how many?

A. Just one warrant with three people's names to it.

Q60. I see. You went up to execute the warrant?

A. Yes.

Q61. And how many officers did you take with you?

A. Two or three. I don't remember.

Q62. And you went in there in this house?

A. They stayed back in the tavern. I went in the house.

Q63. You went in the house?

A. Yes.

Q64. Did you when you went in the house, request permission to enter?

A. I had the warrant in my hand.

Q65. Did you have a search warrant?

A. No, I had a warrant of arrest.

Q66. And Steve was sitting there on the ottoman doing some work, I believe you say?

A. He was pinning this stuff together.

Q67. Now, you are still Chief of Police, aren't you?

A. Yes, I am, I imagine.

Q68. Well, are you or aren't you?

A. Yes, I am.

Q69. You haven't been hurt too much, have you? I mean, professionally?

[fol. 301] A. Well, to a certain extent, I have been.

Q70. You haven't lost any wages, have you?

A. To a certain extent I have been.

Q71. Have you lost wages? Have you been demoted in rank?

A. No, I haven't.

Q72. Now, is there anyone in this county that you know of that saw this pamphlet that you or one of your co-defendants were not responsible for them seeing?

A. Well, nothing more than just—I knew people say it, but they wouldn't talk about it.

Q73. How did you know they saw it? I'm talking about people that you did not tell about or show it to, or Mr.

Combs, or Mrs. Nolan, or Mr. Nolan? Now, is there anyone in this county that received a copy of this through the efforts of Steve Ashton, or did they all learn of it through your efforts, and the efforts of your co-defendants?

A. Mrs. Nolan found a copy in her door.

The Court: Just tell what you know now.

A. He asked me that question, if I knew anybody that received one through his efforts.

Q74. Is there anyone in this county that you know of that knows about the contents of this pamphlet that you or your co-defendants didn't advise them of the contents?

A. Well, certainly. There were people in the tavern there drinking beer.

Q75. At 7:30 in the morning?

A. Not that morning. That night when the officers got it.

Q76. You don't know what was going on there. You weren't there, were you, Bud?

A. No.

[fol. 302] Q77. Well, then, let's confine your testimony to what you know, Bud.

A. I know that Herbert Stacy knew what was in it because it was written and published right in his house, and so did that Sizemore boy that worked down there for him, and so did the people that came in there and drank beer.

Q78. Did they tell you? Did you talk with them?

A. They discussed it later, some of them did, that they had picked it up and read it while—

Q79 (Interrupting) But that was after you had arrested the boy and kept him in jail for about three days?

A. Some of them setting around there and drinking beer while they put it together had read it.

Q80. How do you know that?

A. Because I talked to some of them about it.

Q81. But this was after the boy had been arrested and stayed in jail for about three days, and after you had picked up three hundred copies?

A. I don't know whether he stayed in jail three days or not.

Q82. Well, this Hazard Herald did in one of its weekly editions have on the front page, words to the effect that Commies had come to the mountains of Eastern Kentucky and were leading the strike? Do you remember that appearing in the Hazard Herald?

Mr. Tolbert Combs: I object to that, Your Honor.

The Court: I'll overrule your objection.

(To which ruling of the Court counsel for the Commonwealth excepts.)

[fol. 303] A. I think they did. I'm not sure. I've got copies of all those papers.

Q83. And the Hazard Herald did receive Fourteen Thousand (\$14,000.00) in each and several truckloads of food and clothing, as the result of a CBS-TV show which was shown nationally just before Christmas? Isn't this correct?

A. I don't want to cut you short, but I don't know a thing about how much was received. I didn't know anything about it. I had too many police duties to take care of, and I absolutely don't know how much and who got what. Now, they can explain that. You can ask them.

Q84. You heard Mrs. Nolan testify here at the former hearing, did you not?

A. I think she can testify again. I don't know anything about it.

Q85. You do know that only Eleven Hundred Dollars of this money went to the pickets, don't you?

A. No, sir, I don't know a thing about that.

Q86. Well, you heard Mrs. Nolan admit that they only got Eleven Hundred Dollars (\$1100.00) here in Perry County, didn't you, Bud?

A. I think you ought to let Mrs. Nolan tell you. I don't know.

Q87. If your Honor please—Bud, you read this portion of this pamphlet applicable to Mrs. Nolan, didn't you?

A. Yes.

Q88. Now, you didn't object to reading it, did you?

A. I don't know—

Q89. (Interposing) So far as you know, this is the truth, what you have read about Mrs. Nolan and Mr. Combs, isn't it?

A. Well, no, sir, it's not the truth about Mr. Combs. He [fol. 304] says in this pamphlet that Mr. Combs is the man that did all this beating, and stuff. He says that he did it, and he wasn't even there.

Q90. How do you know he wasn't?

A. I know he wasn't.

Q91. Were you there?

A. No, the officers told me about it.

Q92. Oh.

Mr. Dan Jack Combs: Object, your Honor.

The Court: I'll sustain that objection.

Q93. You feel very strongly about this case, don't you, Bud?

Mr. Tolbert Combs: Bud, just answer the questions yes or no. Will you, please? I think we can dispose of a lot of this fanfare here if you will just answer yes or no.

The Court: Both attorneys know that what somebody told him is not competent evidence.

Mr. Tolbert Combs: Absolutely.

The Court: Go ahead.

Q94. Bud, do you work during the day or night?

A. I work days, and a lot of nights.

Q95. But Primarily, your duties are during the day, aren't they?

A. Most of the time.

[fol. 305] Q96. And you, during the night, when your night shift is on duty, you don't know exactly what they are doing each and every night during this time, did you, Bud?

A. Well, I couldn't exactly account for them all the time, but I was out with them a lot day and night.

Q97. You don't know that the—I believe, Ira Kilburn was on the force at this time was he not, or a few weeks before this?

A. Ira Kilburn was discharged around the 11th or 12th of February—I believe, the formal papers were served on him and charges were preferred against him.

Q98. And you are one of the chargin parties?

Mr. Tolbert Combs: I object to that now, Your Honor. That is immaterial in this case.

The Court: I agree with you.

Mr. Tolbert Combs: And, Bud, if you would answer the question yes or no, whether he was on the police force at that time, we would eliminate a lot of this.

Mr. Luttrell: All right.

(To which ruling of the Court Counsel for Defendant excepts).

Q99. In other words, would it be safe to say that he was discharged from the force some three weeks before March 22nd, 1963?

Mr. Tolbert Combs: Object to that, your Honor. That has nothing to do with the case.

[fol. 306] The Court: You can cross examine him. I'll let him answer that.

Mr. Tolbert Combs: I can't see where that had anything to do with this case.

Mr. Dan Jack Combs: You had him read it, Mr. Combs.

Mr. Tolbert Combs: I said nothing about Ira Kilburn, Dan Jack, being dismissed from this thing here. Where is it at in this pamphlet?

Q100. Well, was there any other policeman discharged from the force three weeks before March 22nd, 1963, besides Ira Kilburn?

Mr. Tolbert Combs: Object.

The Court: Overruled.

(To which ruling of the Court the Commonwealth excepts).

A. Yes, there was.

Q101. Who was it?

A. Robert Paul Campbell.

Q102. When was he discharged?

Mr. Tolbert Combs: I'm objecting, your Honor. I can't see where that has anything to do with the issue in this case.

The Court: I can't see where it will be prejudicial.

[fol. 307] Mr. Tolbert Combs: You're going to get too far afield here instead of confining it to whether or not this man issued this pamphlet, and distributed it.

The Court: I'll overrule the objection.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

Q103. You don't know whether or not pickets guarded one of the policeman that had been discharged three weeks before this pamphlet was written, do you?

A. No, I don't know nothing about that.

Q104. Ira Kilburn was discharged, was he not, largely because of his sympathies with the unemployed coal miners?

Mr. Tolbert Combs: I object to that.

The Court: Overruled.

(To which ruling of the Court the Commonwealth excepts).

A. Absolutely not. It had nothing to do with it. His activities otherwise is what got rid of him.

Q105. Isn't it true, Bud, that when this young man came down here from Oberlin College, in Ohio, that he brought food and clothing for the unemployed and needy of Hazard and Perry County?

A. How do I know that?

Q106. Well, you seem to know a great deal about him—you seemed to on direct examination.

[fol. 308] Mr. Tolbert Combs: I object to the attorney making any such statement as that.

The Court: Overruled.

(To which ruling of the Court the Commonwealth excepts.)

A. How do I know that? I don't know a thing in the world about what he brought down here, and you know that.

Q107. Well, you do know what kind of car he was in, the license number, where it was registered, and so forth, don't you?

A. Yes, but we didn't search the car.

Q108. Had you seen this boy—did you know him or had you ever spoken to him before the time you arrested him?

A. He never contacted us to find out our side of this thing at all.

Mr. Dan Jack Combs: I move to strike, your Honor.

(Reporter's note: The Court did not pass on the foregoing motion).

Q109. This boy had never said or done anything, had he, Bud?

A. No. No.

Mr. Dan Jack Combs: Nothing further.

Redirect examination.

By Mr. Tolbert Combs:

Q1. Now, Mr. Luttrell, tell the Jury the date on that [fol. 309] pamphlet that you have filed there as a part of your evidence?

A. March 22nd, 1963.

Q2. Now, I'm going to ask you a question and I want you to answer it yes or no. Is this statement that you have read to the jury about you having received a Hundred Dollars a Week for guarding an operator's home, was that degrading to your reputation?

Mr. Dan Jack Combs: I object.

The Court: Overruled.

(To which ruling of the Court counsel for Defendant excepts).

A. Yes, it was.

Mr. Dan Jack Combs: I think that is the function of the jury, your Honor.

The Court: It is a conclusion on his part. The Court knows that, but I'll let the jury consider it for what it is worth.

Q3. Now, talking about when you went down with this warrant of arrest, I believe, you described this home of Mr. Stacy as a beer tavern in front and in the back was the home. Now, you don't have to have permission to go in a public place, do you, Mr. Luttrell?

A. No, sir.

Mr. Combs: That's all.

Recross examination.

[fol. 310] By Mr. Dan Jack Combs:

Q1. At the time you made the arrest, Bud, the boy wasn't in the tavern but was in the Stacy home, was he not?

A. Yes, I told you he was in the living room.

Mr. Dan Jack Combs: Nothing further.

(Witness excused.)

The witness, MRS. W. P. NOLAN, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Combs:

Q1. State your name to the jury.

A. Mrs. W. P. Nolan.

Q2. Where do you live, Mrs. Nolan?

A. Hazard.

Q3. How long have you lived here?

A. Since 1956.

Q4. What business, Mrs. Nolan, are you engaged in, please?

A. Well, my husband and I own the Hazard Herald newspaper.

Q5. Owner and publisher of the Hazard Herald?

A. Yes, sir.

Q6. Have you been in that business since you have lived in Hazard, Mrs. Nolan?

A. Yes, sir.

Q7. Now, Mrs. Nolan, there has been introduced in evidence here a pamphlet edited by this defendant, Steve [fol. 311] Ashton, in which certain remarks were made concerning you and Mr. Nolan.

A. Yes, sir.

Mr. Dan Jack Combs: If your Honor please, I would like to object to any reference to Mr. Nolan. The court, at a former hearing, dismissed the case as to Mr. Nolan.

Mr. Tolbert Combs: I think at the conclusion of the evidence the court will readily see that and take the proper steps. It is hard to divide this stuff.

The Court: Well, we'll see about it.

A. What do you want me to answer?

Q8. It's been testified that this pamphlet was edited and in possession of the defendant, Steve Ashton. Have you seen a copy of this pamphlet, Mrs. Nolan?

A. Yes, sir.

Q9. Is that signed at the bottom there by Steve, and in typing, Steve Ashton?

A. Yes, sir.

Q10. In care of Salter, Tougaloo College, Tougaloo, Mississippi?

A. That's right.

Q11. And have you seen, or have you been shown, that part that refers to the Hazard Herald?

A. Yes, sir.

Q12. I'll read you, Mrs. Nolan, the part referring to the Hazard Herald:

[fol. 312] (Attorney reading).

"The old union song is now a realty here—"Which side are you on, boys?" Sides are being chosen now for the show-down, which is on the way and not far off. The Sheriff, State Police, City Police have proven that they are either operators themselves (as is the High Sheriff) or in cahoots with them. The gun-thugs and operators are murderous and crooked men who have starved men to death, and their families with them just so new cars could be bought for every member of the operator's families—

Mr. Dan Jack Combs: I want to interrupt a minute, and move to strike that portion just read by the Commonwealth's Attorney as not being material to the issue, as to this witness.

The Court: I'll sustain that objection.

Mr. Dan Jack Combs: And request the Court to admonish the jury not to consider it.

The Court: The jury will not consider that statement just read to you by the Commonwealth's attorney.

(To which ruling of the Court the Commonwealth excepts).

Q13. (Attorney reading):

"The town newspaper, the Hazard Herald, has hollered that "The commies have come to the mountains of Eastern

Kentucky" and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of [fol. 313] food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1,100 of the money has come to the pickets and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still—"

Have you seen that and read that, Mrs. Nolan?

A. Yes, sir, I have.

Q14. Is there any part of that entire statement that I read, starting with the "town newspaper—" true?

Mr. Dan Jack Combs: Object.

The Court: I'll let her answer.

(To which ruling of the Court Counsel for the Defendant excepts.)

A. Well, you know, the Hazard Herald did receive Fourteen (\$14,000.00) Dollars, and the Hazard Herald did receive truckloads of food and clothing, and the Governor, and the Commissioner of Labor, and several of the State people came here and we had a meeting at the Welfare Department hall here, and the Governor asked us to divide the money, and the clothing, and the food, between seven counties, which we did, and we gave Pike County Twenty-two Hundred and Forty (\$2240.00) Dollars, and Mr. Dan Jack Combs was the recipient of it. We have Har-[fol. 314] lan County Twenty-two Hundred and Forty (\$2240.00) Dollars of it; we gave Johnson County about Eighteen Hundred (\$1800.00) Dollars. It was divided upon the per-capita unemployed basis, and the Fourteen Thou-

sand (\$14,000.00) Dollars that he speaks of here was all spent for the welfare of the needy people. I don't know whether they were all miners, or whether they were all pickets, or what they were, but it was all sent to the needy people—every penny of it, and the truckloads of clothing were divided as near equally, and many of the pickets would go right in the warehouse and help themselves to the food and clothing, and, as a matter of fact, there was about fourteen truckloads of food and clothing went out of that warehouse that I never even seen. I never even went about the warehouse until it was gone, and it was distributed by the miners, and by the committees, selected by the Governor of our state.

Q15. Now, you say this month, this Fourteen Thousand Dollars, was divided amongst seven counties?

A. That's right.

Q16. And that Dan Jack Combs received for Pike County Twenty-two Hundred and Forty (\$2240.00) Dollars?

A. That's right.

Q17. Is that the attorney for the defendant over there?

A. That's right.

Q18. What other counties, Mrs. Nolan, received some of this money?

A. Letcher County received Twenty-two Hundred and Forty \$2240.00 Dollars: Harlan County received Twenty-two Hundred and Forty (\$2240.00) Dollars. It even went over as far as Johnson. Johnson county received Sixteen or Eighteen Hundred (\$1600.00 or \$1800.00) Dollars. And Knott County received Eighteen Hundred (\$1800.00) Dollars. The whole area received the money, and it was all sent to Perry County. If I had it to do over, none of it would go to the other counties. It would be used for Perry [fol. 315] County only. It was all sent to Perry County, and CBS said we could do whatever we wanted to with it—

Mr. Dan Jack Combs: I object now to what CBS said.

The Court: Sustained.

(To which ruling of the Court counsel for the Commonwealth excepts).

A. Well, that's all right.

Q19. Now, Mrs. Nolan, did you give any of that money to the scabs, or anyone else, other than who it was supposed to go to?

A. I don't know who is a scab. We gave it to them on the basis of need, and need only when they come for it, and we would check with the Welfare Department, or check with some group of people that was supposed to know, and we gave it to them on the basis of need, and we didn't ask them if they were a picket, or a miner.

Q20. Then, Mrs. Nolan, this article written by this defendant, Steve Ashton, according to your testimony, is untrue?

Mr. Dan Jack Combs: Object.

The Court: Well, overruled.

(To which ruling of the Court counsel for defendant excepts.)

A. It certainly is, and he never came to me one time and asked one question.

[fol. 316] Mr. Dan Jack Combs: Object.

The Court: Sustained.

(To which ruling of the Court Counsel for the Commonwealth excepts).

Q21. Now, Mrs. Nolan, had this defendant, Steve Ashton, come to you as publisher of the Hazard Herald—

Mr. Dan Jack Combs: I object to what she would have done.

Mr. Tolbert Combs: Will you wait until I ask the question, please, Mr. Combs.

Mr. Dan Jack Combs: I beg your pardon. I'm sorry, I thought you had finished.

Q22. If this young man had come to you as publisher of the Hazard Herald before he published this pamphlet, would he have had any difficulty in getting the figures on the distribution of this relief money from you?

A. None whatever. We had nothing to hide.

Q23. Did he make any effort to ascertain the truth from you?

A. No.

Q24. Before he wrote this article?

A. No, sir.

Q25. Now—

A. (Interposing). I never knew Steve Ashton existed until this pamphlet came out.

[fol. 317] Q26. Now, on the day that this pamphlet was called to your attention, Mrs. Nolan, had you seen one?

A. Had I seen one?

Q27. Yes, ma'am?

A. Well, one had been stuck in our door. This Miner's Voice had been stuck in our door with many libelous things said in it—

Mr. Dan Jack Combs: Object.

The Court: Sustained.

(To which ruling of the Court Counsel for the Commonwealth excepts).

A. —and this pamphlet was one of these pamphlets that was stuck in our door.

Q28. When did you find this pamphlet there, Mrs. Nolan?

A. Well, I think my husband was the first one found it, and he didn't say much about it. We had gotten so used to it.

Q29. You say it had been stuck underneath your door?

A. Yes.

Q30. Of course, you have no knowledge of who stuck it there?

A. No, sir, I don't.

Q31. Now, tell the jury what effect this pamphlet had on

you, and your feelings, as to whether or not it degraded you?

Mr. Dan Jack Combs: Object.

The Court: Overruled.

[fol. 318] (To which ruling of the Court Counsel for defendant excepts).

A. Well, you know, anytime the public talks about you it hurts your feelings. We're all human, and I had really felt like we were doing a good work, and I know we were trying to do a good job. Of course, we had a group that worked with us. I was not the last word. I never wrote one check on this account. We had a committee. Rev. E. Tipton Carroll was the chairman of the group. Mrs. Howard Hatmaker was the Treasurer. The Junior Chamber of Commerce worked with us, and I never wrote one check. They were all voted on, and decided who needed it, and who needed help, and if we had the money and could help them, we did, but I never even wrote one check—never even had my hands on one check.

Q32. Now, Mrs. Nolan, did you have any feelings against the miners simply because they were or were not on the picket line, or pickets?

A. No, sir, I had no feelings whatever against the miners. I did have feelings against the violence.

Q33. I believe your father was a coal miner?

A. My father worked right in the Hazard Coal Fields when I was a small girl.

Mr. Tolbert Combs: I think that's all I care to ask her now.

Cross examination.

By Mr. Dan Jack Combs:

Q1. Mrs. Nolan, did I understand you to say that your father was a coal miner?

A. Yes, sir.

Q2. Underground miner, or operator?

[fol. 319] A. Underground miner, yes, sir.

Q3. In a supervisory capacity?

A. No, sir, coal loading, and my uncle was killed in the Perry County mines—Tom Miller, at Meem-Haskins.

Q4. Now, Mrs. Nolan, The Commonwealth Attorney has read you a portion of this pamphlet. I'll ask you Ma'am, if your—one of your editions of the paper did not have either as a headline, or certainly on the front page, words in an article captioned to this effect: The Commies have come to the mountains of Kentucky?

A. That's right.

Q5. I believe, you admitted that your newspaper received Fourteen Thousand (\$14,000.00) Dollars cash, and several truckloads of food and clothing?

A. That's right.

The Court: Did it receive any more than Fourteen Thousand (\$14,000.00) Dollars?

A. Yes sir, it did.

The Court: Has that all been distributed now?

A. Practically all of it, I think, has been. Mr. Carroll would have to tell you that, and Mrs. Hatmaker, because they are the ones that writes the checks, and pays the bills.

The Court: You don't know that it even has been distributed as of today?

A. All but a small amount of it has.

[fol. 320] The Court: What about clothing? Do you have any clothing of any kind?

A. Well, there's some clothing in the warehouse, but it is mostly winter coats, and things—old clothes that nobody would have. We have had people go through them and got all they wanted of them, and they didn't take these because they weren't very good.

The Court: Do you know about how much more than Fourteen Thousand (\$14,000.00) Dollars has been received by your committee?

A. Well, I think, we received nearly Twenty Thousand (\$20,000) Dollars.

The Court: Near Twenty Thousand Dollars?

A. Yes, sir.

The Court: Go ahead.

Q6. Now, I believe, you received this money—or your paper received this money, and this food and clothing, as the result of a CBS-TV National hook-up. TV show, is that correct?

A. That's right.

Q7. And this was just before Christmas?

A. Of 1962.

Q8. And did you see this TV show, Mrs. Nolan?

A. Well, I seen one of the shows. That show that I saw that showed the family that our funds started from, was the Miller family down here at Air Port Gardens, and they were farmers.

[fol. 321] Q9. Well, my question was did you see the TV show—

A. (Interposing) I saw the Miller show.

Q10. —the show that gave rise to all these contributions coming in?

A. The show I saw, that's when the money started coming in to us.

Q11. This TV show, Mrs. Nolan, dealt primarily with the unemployed coal miners, and their efforts to obtain jobs in order to support their families. Is this not true?

A. I don't know. I didn't see that show, but the one our money started from was the Miller family.

Q12. Well, who carried the Miller family? What network—what TV network?

A. CBS. CBS came here and made pictures of them,

and my husband, and Mrs. Hatmaker, went out there with them to make pictures of the family.

Q13. Did you understand that there was a nationally televised program here by CBS showing the activities—

A. I heard about it, yes.

Q14. It's common knowledge. It was shown here in Hazard?

A. But the funds that came to the Hazard Herald, I want you all to know, they didn't come to the miners. They came to the Hazard Herald Fund—Hazard Herald Helping Fund. CBS asked us how to have the funds made out, and we told them to make it to the Hazard Herald Helping Fund. We made a name for it, and we organized, and it came to the Hazard Herald Helping Fund, and hardly a letter came that mentioned the miners. They said help the needy people.

Q15. Well, my question is this: This National televised TV program was devoted almost exclusively to the unemployed coal miners?

A. The one you're speaking of did, but the one I'm speaking of didn't.

[fol. 322] Q16. Do you know Ed Fosset?

A. Ed Fosset, no, I don't. Is he connected with the State?

Q17. Do you know the Assistant to the Governor that met with you?

A. Ed Easterly, yes, sir.

Q18. Ed Easterly?

A. Yes, sir.

Q19. Now, isn't it a fact that CBS contacted Ed Easterly about where this was to go?

A. I wouldn't know about that.

Q20. But you will admit, will you not, that there was a TV crew in this county, and in these coal fields, for many weeks, filming the condition of the working men in the area, and their efforts to obtain employment?

A. Sure, but I will also admit—

Q21. Just answer yes or no.

A. I don't see why.

The Court: Just answer his questions, Mrs. Nolan.

A. I said, yes.

Q22. And this TV show was dealing with this strike, this labor unrest—these picket lines, was it not?

A. The NLRB ruled it wasn't a strike.

The Court: Just answer his questions, Mrs. Nolan.

Q23. What do you know about the NLRB ruling?

A. They ruled that the pickets wasn't legal coal strikers.

Mr. Dan Jack Combs: Your Honor please, since she has injected this, may I enlighten the jury on it?

[fol. 323] The Court: You may. Ask her anything you want to about it.

Q24. The hearing examiner, Mrs. Nolan, for your information—

Mr. Tolbert Combs: Now, your Honor, we are not giving out information here for the benefit of Mrs. Nolan. We are giving it out for the benefit of this jury.

The Court: That's all right. Go right ahead.

Mr. Tolbert Combs: And this has no bearing on this case.

The Court: Let him go right ahead.

(To which ruling of the Court counsel for the Commonwealth excepts.)

Q25. The effect of the ruling of the hearing examiner for the National Labor Relations Board, which I participated in, was that these men were not a labor organization?

A. That's what I say.

Q26. That had nothing to do about strikes?

A. That's what I said.

Q27. Well, what did you say about strikes? Why did you say strike?

A. Well, they claimed they were striking.

Q28. The Board did not say that they weren't strikers, did it?

[fol. 324] Mr. Tolbert Combs: Your Honor, I'm objecting.  
The Court: Overruled.

(To which ruling of the Court counsel for the Commonwealth excepts).

Q29. The National Labor Relations Board.

A. It said they weren't Union men—said they weren't connected with any organization, but they claimed they were striking—these companies, and things.

Q30. They were striking against companies too, weren't they?

A. That's what the National Labor Relations Board said.

Q31. Now, you're one of the owners and publishers of this paper?

A. Yes, sir.

Q32. And Hazard and Perry County was one of the centers of this labor unrest. Now, from your own personal knowledge, don't you know that there was strikes; that there was picketing?

A. I have a different name for them, Mr. Combs.

Q33. What is your name for them?

A. I would rather not say.

Q34. Why?

The Court: Well, you have another name. Go ahead and tell the jury now. What is your name for them?

A. No, I'll not tell the jury.

The Court: Well, you will, or I will send you to jail.

[fol. 325] A. Well, that's all right, if you want to.

The Court: You answer that question.

Q35. What is your name for these poor underprivileged, unemployed picketing coal miners, Mrs. Nolan?

A. They weren't unemployed at that particular time. They were people that had been worked out of jobs and things.

Q36. Well, what is your name for these men who were on the picket line?

The Court: Go ahead and tell the jury what your name for them is.

A. Well, pickets. They said they were roving pickets.

Q37. Is that your name for them too?

A. Yes, roving pickets.

Q38. You are familiar with the editorial policies, and the editorials, appearing in your newspaper?

A. Yes, sir.

Q39. Tell me, Mrs. Nolan, if any of those editorials ever editorialized, or discussed, the plight, or problems, of the unemployed miners in this area?

Mr. Tolbert Combs: Object, Your Honor. Don't answer that, Mrs. Nolan.

The Court: Now, just wait a minute. Don't you tell her how to answer it. Read the question back.

(Reporter reading: "Tell me, Mrs. Nolan, if any of those editorials ever editorialized, or discussed, the plight, or problems of the unemployed miners in this area?")

[fol. 326] The Court: I'll let her answer it.

Mr. Tolbert Combs: Your Honor, I want to apologize to the Court. I didn't tell her not to answer. I meant not to answer until the Court ruled on it.

The Court: That's all right.

Mr. Tolbert Combs: I think the question is immaterial. It's not relevant; it's incompetent. It's not pertinent to this issue—

The Court: Well, I'll let her answer it.

Mr. Tolbert Combs: —and it is just revolting in personalities between Mr. Combs and Mrs. Nolan, and I don't think the jury should be subjected to that, Your Honor.

The Court: I'll let her answer it.

Mr. Tolbert Combs: Show my exceptions.

A. What was the question?

The Court: Read it back to her.

(Reporter reading: "Tell me, Mrs. Nolan, if any of those editorials ever editorialized, or discussed the plight, or problems, of the unemployed miners in this area?")

[fol. 327] A. I have nothing to do with the editorial policy of the Hazard Herald.

Q40. You are part owner and publisher, are you not?

A. Yes, sir, but my husband is publisher.

Q41. You mean, you don't know what the editorials are in your paper—you don't read them?

A. Surely, I read the editorials.

Q42. Well, my question is this: Have any of those editorials which you have read, and which appeared in your paper, have they ever discussed sympathetically the plight of the hundreds of unemployed coal miners in this area?

Mr. Tolbert Combs: Object.

The Court: Overruled.

(To which ruling of the Court counsel for the Commonwealth excepts.)

A. Practically since we have established the Hazard Herald, we have fought constantly for the needy in this area, for the unemployed.

Q43. Isn't it a fact that your most recent editorial was to the effect that the people in this county needed no relief?

A. Well—

Mr. Tolbert Combs: Show an objection to that.

The Court: Overruled.

(To which ruling of the Court counsel for the Commonwealth excepts.)

[fol. 328] A. I didn't write the editorial, but I know the editorial that you're speaking of. We said they didn't need relief as such; they needed work, and jobs, that they could take pride in and that they could build themselves up in, not relief. Public work is what we need.

Q44. Now, this paper says that you all, and your paper, are vehemently against labor.

A. That's false.

Q45. Are you for labor?

A. My husband is a member of the International Typographical Union, with honorable standing.

Q46. Are you for labor?

A. Yes, sir.

Q47. Have you done anything—

A. (Interrupting) We keep labor.

Q48. Have you done anything to help the plight of the unemployed laboring man in Perry County?

A. We have fought with every paper that's come out for the people in Perry County, for labor, and for better living conditions, and work. I don't believe anybody in this room that reads the Hazard Herald could deny that.

Q49. You mentioned that I received Twenty-two Hundred (\$2200.00) Dollars of this Fund. Do you mean to say that I got the money?

A. Well, Mr. Combs, you were supposed to send us back a voucher to show where that money went, and to this day I've never seen the voucher. Where did the vouchers go to—for the groceries? I'll ask you a question.

Q50. Well, you received it.

A. You were supposed to send me Twenty-two Hundred and Forty (\$2240.00) Dollars worth of vouchers back.

Q51. All right.

[fol. 329] A. And to date I've received none.

Q52. But you do understand this money was distributed throughout Pike County?

A. Well, it was supposed to have been. I wasn't in Pike County. I don't know.

Q53. You were in Perry County?

A. Yes, sir.

Q54. And in Perry County is where all the problems and trouble came up about this money, and who was to receive it, and the trouble created by you—

Mr. Tolbert Combs: Object to that statement.

Q55. —is the reason the Governor sent in this team?

(Reporter's note: The Court did not pass on the foregoing objection).

A. I'm only one of a group, you remember.

Q56. Now, do you know Rev. Garret White?

A. Yes, sir.

Q57. Now, Garret White was with us in these meetings held here before Christmas, wasn't he?

A. Yes, sir.

Q58. Isn't it a fact, Mr. Nolan—

Mr. Tolbert Combs: Your Honor—pardon me, Mr. Combs—I want to object to this line of questioning. If Mr. Combs wants to testify about who was in the meetings, let him take the witness stand.

The Court: He is asking her and she can answer if she knows. If she doesn't, she can say I don't know.

[fol. 330] (To which ruling of the Court Counsel for the Commonwealth excepts).

Q59. Rev. Garret White was interested and active in this picket movement here, was he not?

A. Well, I don't think Mr. White was ever on the picket line, or, at least, he said he wasn't. I think he tried to help some of the pickets in these meetings. He worked constantly all through the strike.

Q60. He was one of the committeemen that the pickets elected to work with you in an effort to distribute this stuff?

A. I don't recall that. Mr. Calvin Manis has all that. I don't know.

Q61. You were present when this meeting was held?

A. Well, it's been so long, I've really forgotten, but Calvin Manis has the list of every one.

Q62. Now, Mrs. Nolan, you knew that Rev. Garret White was on this committee designated by the unemployed miners, didn't you?

A. Well, I wouldn't say for sure.

Q63. Isn't it a fact that you refused to cooperate in any way with Rev. White in his efforts to see that some of the money and clothing went to these men who had been on the picket line?

A. I wasn't the last word. There was nine people in my group.

Mr. Tolbert Combs: Your Honor, I'm insisting that my objections be sustained to that.

The Court: Well, I'll let her answer it.

[fol. 331] Mr. Tolbert Combs: Well, what—

The Court: I've ruled on it, Mr. Combs, and I'm going to let her answer it. There's some things the Court wants to know about this, as well as the Jury.

Mr. Tolbert Combs: Well, Your Honor, I think that that could be true. I'm not criticizing that, but there's things going in here to this Jury that's not pertaining to this case.

The Court: I don't think so. I think it will explain things considerably.

Mr. Tolbert Combs: Well, I'll say this much, if Your Honor wants that explained, let's go out in chambers and let her explain it to you.

The Court: Let her explain it right here in public so everybody can hear it.

Mr. Tolbert Combs: Well, show the Commonwealth's exceptions to the ruling of the court.

Q64. Now, Mrs. Nolan, this paper further says that only Eleven Hundred (\$1100.00) Dollars of the money has come to the pickets. Is this correct or incorrect?

A. All the money went to the unemployed people.

The Court: He said pickets.

[fol. 332] A. I don't know who it went to.

Q65. You do have an Eleven Hundred (\$1100.00) Dollar check there, do you not?

A. I don't have any checks, no.

Q66. Well, I will ask you—you testified at a former trial, didn't you, in this case?

A. Yes.

Q67. I'll ask you Ma'am if this question was asked you, and if you made this answer, appearing on page 106, Question 8:

"Now, how much money did you actually give the pickets of Perry County?

A. They pro-rated it, and they gave us the figures that they had. It was divided equally between the people that was needy, and the pickets, and it was paid by check.

Q. Well, how much did they get, Ma'am?

A. It seems to me like it was \$1100.00. I've got the Check down there.

Q. That is what the paper says too, isn't it—\$1100.00?

A. I'm talking about the pickets though.

Q. Well, that's what I'm talking about.

A. He says we only gave \$1100.00.

Q. I'll ask you if it doesn't say this: "Apparently that is what she has done, for only \$1100.00 of the money has come to the pickets, and none of the food and clothes." So, in fact, you only gave \$1100.00 to the pickets of Perry County, is that correct?

A. None of the food and clothing and \$1100.00."

A. Well—

Q68. Were those questions asked you, and did you give those answers?

[fol. 333] A. Yes, but the food and clothing, the pickets got their pro-rated share, just like I said, in seven counties. We got fourteen truckloads of food and clothing, and the pickets got all of that two truckloads of food and clothing, at the outset, and, of course, the balance of the money went to unemployed miners throughout the county—people who came in and were needy. Every penny of it went to unemployed miners, or people who were indirectly affected by the mines.

Q69. But this is essentially what the paper says. You do have an Eleven Hundred Dollar check there, don't you?

A. Well, I guess Mrs. Hatmaker has it. She is the Treasurer. I don't.

Q70. You still have some things that are still under lock and key, I believe?

A. As I said a moment ago, there's some old clothing—

Q77. Well, you still have some things that are still under lock and key?

A. Well, anything you have you have to keep under lock and key, Mr. Combs.

\* \* \* \* \*

Q79. Well, will you admit—

A. (Interposing) If you didn't, it would be taken out overnight.

Q80. Well, do you admit that it is still under lock and key?

A. Anybody can go over there anytime they want to. We have taken hundreds and hundreds of people there and give them clothing.

Q81. Now, Mrs. Nolan, what did you do—you say, you found one of the pamphlets in your door?

A. Yes, sir.

Q82. What did you do with it?

A. My husband had it.

Q83. What did he do with it?

A. He turned it over to Mr. Luttrell. Mr. Luttrell has all [fol. 334] of the evidence.

Q84. But the defendant didn't turn it over to him, did he?

A. You mean, who?

Q85. The defendant, Steve Ashton?

A. I don't know who put it in the door.

Q86. In other words, if it went into the hands of a third party your husband placed it in the hands of a third party, did he not?

A. Yes, of course.

Q87. You have been in the newspaper business for some time, haven't you.

A. Yes.

Q88. Newspaper publishers and reporters, they are usually called a task, or not usually called a task, but quite

often are critical, or criticized for some of their articles, is this not true?

A. Well, you naturally can't please all the people.

Q89. And, I assume, over the years with your experience in the newspaper business, you have become, shall we say, hardened to criticism, as is the case with all newspaper people?

A. No, sir. It hurts just as much now as it did the first day I ever went in the newspaper business.

Q90. Who was this check for Eleven Hundred Dollars made out to—the Eleven Hundred that's mentioned here in this letter?

A. It was made out to the committee that was recommended by the labor group. I think, maybe, Mr. Calvin Manis and Mr. Colwell, I believe—Harley Colwell.

Q91. Do you know whether or not that check was made to Burman Gibson?

A. I don't know that—no, it wasn't made to him. He was the one that was spear-heading the group.

Q92. Rev. Garret White was with the group too, wasn't he?

A. I don't remember seeing Rev. Garret White there. Could I make a statement?

[fol. 335] Mr. Dan Jack Combs: Nothing. I have no further questions.

Mr. Tolbert Combs: I think you are entitled to make a statement, Mrs. Nolan.

Mrs. Nolan: Could I make a statement, Judge Wells?

The Court: Is there any objection?

Mr. Dan Jack Combs: I don't know what the statement is going to be. At this time I don't object.

Mrs. Nolan: Well, you don't have to record it if you don't want to, and then if you want to record it later, you can.

The Court: Go ahead and take it down, whatever she says.

Mrs. Nolan: At the outset of this strike, or any strike—we've been in the labor field since 1931—in the coal fields—

at the outset of this strike, or any strike, our newspaper has continued to play down the strike; to keep down violence; to keep down strikes; to keep as much harmony in the community as we could, in the community between labor and capital, and at the outset of this strike we did the same process. We were going along—we weren't hardly saying anything about the pickets, or the strike; we weren't mentioning it in our paper, and one day, Mr. Gibson, and two or three of the other pickets, came to our office and said [fol. 336] that if we didn't start cooperating with them there was going to be blood shed—one day along in the strike, and at that time I wasn't in, but the little office girl was scared to death, and so was the office boy, and he ran to the back—

Mr. Dan Jack Combs: If your Honor please, this repeated hearsay, I don't think should go in.

Mrs. Nolan: This is not hearsay. This is coming from the co-owner of the Hazard Herald, and I know our policy. Our policy has been to create harmony in the community, and good will, while the strike is in effect.

Further cross examination.

By Mr. Dan Jack Combs:

Q93. How successful has your policy been, Mrs. Nolan?

A. Well, I think it has been very successful.

Q94. There has been quite a bit of strikes in the county, hasn't there?

A. Well, there has been strikes in Africa, and other places in the world.

Q95. In fact, your paper, as a matter of policy, tended to ignore the plight, the condition of—

A. (Interrupting) We didn't ignore it, Mr. Combs, but we didn't play it up. We didn't try to stir it up.

Q96. Isn't it a fact that you resented all these articles appearing in the national magazines, national television, and everything?

[fol. 337] A. They didn't start appearing in the national magazines until the Herald—after they did that, the Herald began to bring all the activities to light—all the activities. They didn't start coming until after that.

Q97. But your paper saw fit to ignore the hardships, the plights.—

A. We didn't ignore them.

Q98. Did you write on them then?

A. Every paper that has been published by the Hazard Herald since we've been in Perry County has come out to try to get things for this area; to try to get improvements; to try to get factories; to try to get flood control; to try to get the things that we need, and as soon as this strike came along, the little fellows from New York, and places like that, came down here to try to stir up strikes, agitate, and we have always tried to keep harmony, and tried to keep strikes down.

Q99. These little fellows from New York, are you talking about CBS?

A. Huh?

Q100. Are you talking about CBS?

A. No, I'm not talking about CBS.

Q101. Are you talking about American Broadcasting?

A. I'm talking about these—

Q102. Are you talking about Time, News Week, and Post?

A. I'm talking about the card carrying communists that came right into my office—

Q103. Oh.

A. —and showed me their cards, and told me that America had to go communist—that's what I'm talking about.

Mr. Dan Jack Combs: If your Honor please, I move the [fol. 338] Court to admonish the jury. This is completely unresponsive.

The Court: The Jury will ignore that, and give it no consideration whatever.

Mr. Dan Jack Combs: I have no further questions.

(Witness excused).

The witness, CHARLES E. COMBS, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Tolbert Combs:

Q1. State your name to the jury?

A. Charles E. Combs.

Q2. Where do you live, Mr. Combs?

A. Lothair.

Q3. How long have you lived here in this county?

A. 54 years.

Q4. At present do you hold any elective office in Perry County?

A. Sheriff of Perry County.

Q5. Were you the elected sheriff of Perry County in March of this year, 1963?

A. Yes, sir.

Q6. Now, along in the month of March of this year 1963, did a pamphlet signed by Steve Ashton come to your attention?

A. Yes, it did.

Q7. In that pamphlet was there some reference made to [fol. 339] you as a public official?

A. Yes, there was.

Q8. Now, Mr. Combs, I will ask you—there's an instrument here that's already been introduced in evidence, containing a portion of a paragraph concerning you as a public official. I will read this to you, Mr. Combs:

"The High Sheriff has hired 72 deputies at one time more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent court decision he was fined \$5,000.00 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs

offered the boy \$75,000.00 to keep it out of Court but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court. He wants \$200,000. Combs is now indicted for murder of a man—voluntary manslaughter. He is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gunpoint."

Now, Mr. Combs, is there any part of that statement that is true? Did you have at this time 72 deputy sheriffs on your force?

Mr. Dan Jack Combs: I object. To that question, no. I withdraw the objection to that part.

A. No, I didn't have 72 deputies.

[fol. 340] Q9. The deputies that you did hire, were they hired because they wanted to carry guns?

A. Not exactly. They were hired because I wanted them to carry guns.

Q10. At that time were you a mine operator?

A. Yes, I am.

Q12. It is true that a judgment here in the civil courts was obtained against you for \$5,000.00, is that right, Charlie?

Mr. Dan Jack Combs: Object. He is leading the witness. The Court: Overruled.

(To which ruling of the Court Counsel for the Defendant excepts.)

A. That is true that a judgment was entered against me.

Q13. Now, did you intentionally blind a boy with tear-gas, and beat him, while he was locked in a jail cell with his hands cuffed?

A. I never shot anybody with tear-gas, or beat anybody. I haven't even as much as hit a man since I've been sheriff.

The fact about it, I wasn't even at the jail at the time this happened.

Q14. Before the trial of this civil action, Mr. Combs, did you offer this boy \$75,000.00 to keep it out of court?

A. I have never spoke as much as hello to that boy since I've known him.

Q15. Now, then for a few thousand dollars did you buy [fol. 341] off the jury, or did you make any attempt at all to buy off the jury?

Mr. Dan Jack Combs: Object.

Mr. Tolbert Combs: That's one of the statements that's made here, Your Honor.

Mr. Dan Jack Combs: It says probably.

The Court: I'll let him answer.

(To which ruling of the Court counsel for defendant excepts.)

A. I did not.

Q16. Now, were you indicted for voluntary manslaughter, Mr. Combs?

A. I was.

Q17. And you are, of course, still the Sheriff of this county?

A. I am.

Q18. Now, do you have the support of rich men because you will fight the pickets?

A. I think I have the support of the biggest part of the people of Perry County, rich and poor.

Q19. Rich and poor?

A. That's right.

Q20. Is that because you fight these pickets, or have you fought the pickets?

A. I haven't fought the pickets.

[fol. 342] Q21. Now, I believe you stated that you were not present at the jail when some person was shot with tear-gas and beaten up, if he was beaten up? You were not there?

A. That's right. I was not there.

Q22. Now, when you read this pamphlet that was signed by Steve Ashton, I will ask you whether or not the reading of that by you and the subject matter of the pamphlet, caused you to have a feeling that its publication would degrade you in the community where you live and where you work?

Mr. Dan Jack Combs: Object.

The Court: Overruled.

(To which ruling of the Court counsel for Defendant excepts.)

A. I certainly did.

Q23. Well, could you tell us just what effect it had on you, Charlie?

A. Well, people always looking at you as you go down the street and wondering if you really did that. They don't know. Just what they read, that's all they've got to go by, and people make the remark to—did you do that, did you do that, and this news—this publicity of this thing, scattered far and near, even all over the United States.

As far as locally, it didn't hurt me too bad locally because most of the people know me, and that's all I want, is the people to know me. I don't expect anything except what they think, but outside of the State where people don't know me, it's pretty rough.

[fol. 343] Mr. Dan Jack Combs: If your Honor please, I would like to object and move to strike his reference to outside the state. There's been no predicate laid. There's no evidence of any publication even within the City, much less outside the State. I think this is exceedingly begging the question here, and I would like to move the Court to strike that portion of his testimony.

The Court: Well, so far as the evidence has gone, I don't remember any evidence—all we're concerned with here are these particular pamphlets that have been introduced as evidence here, and if there's ever been one of them sent outside the state, I don't remember the evidence. The Court will sustain that objection.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

Q24. Well, locally, Charlie, did they have a tendency to degrade you?

Mr. Dan Jack Combs: He testified that it didn't; that he still had the support of the people.

A. I said it probably did.

Q25. That's what I thought. It did, is that you answer, Charlie?

A. Yes, sir.

Q26. Now, Mr. Combs, if this defendant, Steve Ashton, had come to you before printing this pamphlet and asked [fol. 344] you for the true facts about each one of these statements, would you have given it to him?

A. I gladly would have.

Q27. Did he ever come to you?

A. I never saw Steve Ashton until after this pamphlet came out.

Mr. Tolbert Combs: That's all I care to ask him at the time being.

#### Cross examination.

By Mr. Dan Jack Combs:

Q1. Charlie, you do, or you did back in March of this year, you did escort employees to their mines through the picket lines in Perry County, didn't you?

A. Yes, sir, we did.

Q2. And the State Police did just like you?

A. Yes, sir.

Q3. You being an operator, belonged to the organization to which all of the coal operators belonged, didn't you, here in Perry County?

A. I don't belong to any coal operator's organization.

Q4. Your interest was the same as theirs?

A. My what?

Q5. Your interest is the same as theirs when it comes to the coal business?

A. I'm in the coal business, sure. We're all interested in coal.

Q6. And you're doing right well in the coal business?

Mr. Tolbert Combs: Object to that.

[fol. 345] The Court: Overruled.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

A. Well, I'm not what you call doing right well, I'm keeping about fifty hungry families in something to eat. As far as making money is concerned, I'm not making any money right now.

Q7. Were you in March of this year?

A. No.

Q8. Isn't it a fact, Charlie, that you have fought these pickets ever since they have been active?

A. No, sir, I have never fought the pickets, or any other class of people.

Q9. I will ask you, Charlie, if it isn't true that you and your deputies would meet with this motorecade and stay right with the motorecade, and that you would go to the hospitals where they would meet and follow them around, and that you would haul the men who were non-union into the mines through the picket lines?

A. We would go to the hospital and meet with the pickets, and go with them. That is true. We certainly did.

Q10. How many of your coal operating friends, Charlie, have you deputized in the last few years?

A. I don't recall. They may be three, or four, or five of them.

Q11. What about the officials of the rest of the coal operators that you have not deputized, how many of them have you deputized?

A. Well—

Q12. The lesser officials of coal operating companies?

A. I don't recall right offhand about it. I could probably check the record on it.

[fol. 346] Q13. How many unemployed coal miners have you hired as deputies, Charlie?

A. How many unemployed?

Q14. Yes.

A. Well, I have—they're not unemployed—they are employed now—I have two that I know of, that I recall, but they are employed. They weren't at that time, but they are employed now.

Q15. How long have they been employed?

A. Oh, they've been employed for about six months.

Q16. How many did you have in March of 1963?

A. I don't recall.

Q17. Isn't it a fact, Charlie, that you had more deputies in March of this year than Perry County had ever had in its history?

A. Well, I don't know how many Perry County has ever had prior to this, and I really don't know how many I had exactly. I know I had quite a few of them on the list. I don't remember just how many there were.

Q18. Give the jury some idea both as to your active and your inactive deputies?

A. Well, they were all that were on there were active, as far as that's concerned—I mean, they were legal deputy sheriffs.

Q19. Yeah, but the coal operators, they didn't go around and patrol the night spots, or walk the streets—that type of inactive deputies?

A. There wasn't any of them went around at night walking the streets, as far as that's concerned. Of course, we covered the entire county.

Q20. Well, let me put it this way: How many of them served—how many of these deputies that you had that were connected either directly or indirectly with coal mines, that did not serve papers of the courts which you served?

[fol. 347] A. I couldn't make a specified number on that,

but there was quite a few of them did serve papers, and there was quite a few of them didn't serve any papers.

Q21. Well, about how many of them didn't serve papers?

A. Well, I'd say, maybe fifteen or twenty.

Q22. About fifteen or twenty. Of that fifteen or twenty, how many of them were coal operators, or employees of coal operators?

A. That would be pretty hard for me to tell you exactly.

Q23. All right, how many deputies did you have at this time that served papers—that were active; that didn't have any other occupation?

A. That didn't have any other occupation?

Q24. Uh huh, that devoted their full time to the duties of a deputy sheriff?

A. I don't know, there must have been eight or ten that didn't have any other occupation.

Q25. Now, that gives us either twenty-three or thirty deputies. Are you telling this Court that in March, 1963, that you had no more than thirty deputy sheriffs?

A. No, I wouldn't say that.

Q26. What would you say, Charlie?

A. I said I didn't know exactly how many. I think there was more than that, but not as many as seventy-two (72). I recall one time checking, and, I believe, it was around forty-eight (48) that was on the books.

Q27. When did you check that?

A. Well, about the time that they come up with this seventy-two (72) stuff.

Q28. Uh huh. And, you say, you only had forty-two (42)?

A. I think it was about forty-eight (48). I believe, to the best of my knowledge, that's what it was.

[fol. 348] Q29. How many did your predecessor have?

A. I don't have any idea.

Q30. You don't know how many he had?

A. He might have had a hundred for all I know. I don't know. Every time you would turn around you would see one. That's all I know.

Q31. I believe you were under indictment for manslaughter on March 22nd?

A. That's right.

Q32. And judgment was returned against you in the amount of \$5,000.00 for an injury to a boy who was in the jail, is this correct?

A. That's correct.

Q33. Who did you say showed you this pamphlet the first time you saw it?

A. This pamphlet?

Q34. Yes.

A. Well, I think, I was over at the City Police Headquarters the first time I saw it.

Q35. Did somebody call you over there?

A. No, I just happened to go in there.

Q36. What day was this?

A. I don't remember what day it was.

Q37. Do you remember when you swore out the warrant?

A. It was the day before I swore out the warrant. Have you got the record there of when he was arrested? That will answer your question.

Q38. Now, I believe, you said a while ago that you had the support of the rich and poor alike. Do you still have that support?

A. Yes, sir.

Q39. Then this paper, if it were published and were untrue, has not affected you at all, has it?

A. That what?

[fol. 349] Q40. This paper, if it were, in fact, published, and if the things said in it about you were untrue, then it hasn't hurt you at all anyway?

A. Why certainly it has hurt me.

Q41. How has it affected you?

A. Well, it has put a lot of doubt in the minds of a lot of people that don't know—sure.

Q42. But you still have the support of the rich and poor?

A. Well, I didn't say I had the support of all of them. I have the support of some of them, both rich and poor.

Q43. Now, those that may have some questions, or doubts, in their minds, Charlie, how did they learn about this pamphlet?

A. Well, the pamphlet was no secret around here. Everybody was talking about it.

Q44. Well, how did they get started talking about it? Was it when you all swore out these warrants, and went down there and confiscated about three hundred of them?

A. No, I didn't go down there. He was given an examining trial in the City court, and there was quite a few people around there the day he was given his examining trial. And, of course, if the woods catch on fire, you know, it spreads. So, that's the same thing with this pamphlet.

Q45. But this boy didn't give this to you, or circulate it around, did he?

A. No, that boy didn't give it to me. I don't know what he did otherwise.

Mr. Dan Jack Combs: No further questions.

(Witness excused.)

\* \* \* \* \*

[fol. 352] The witness, C. W. BEGLEY, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Tolbert Combs:

Q1. State your name to the jury.

A. C. W. Begley.

Q2. By whom are you employed, Mr. Begley?

A. City Policeman.

Q3. Were you employed by the Hazard City Police Department in March of this year?

A. Yes, sir, I was.

Q4. In the month of March, Mr. Begley, did you come into possession of a pamphlet from this young man over here, Steve Ashton, the defendant, in which there was a

reference made to Chief Bud Luttrell, and Sheriff Combs and Mrs. W. P. Nolan?

A. Yes, sir.

Q5. Now, Mr. Begley, without me asking so many questions, go ahead and tell the jury just how you came into possession of this pamphlet?

A. Well, as I say, I went to work at 11:00 o'clock that night, on March 26th. I went down—we checked out our regular patrol, go to beer taverns and check them out for disturbance. In this place, Steve Ashton was there, and four or five other subjects, and there was some pamphlets laying on the table. Sgt. Cook was with me, and he saw the pamphlets and asked what they were, and he said "reading material." He wanted to know if I wanted one, and I said yeah. I started to get one off of the top, and he said "no, not there", and he got one out from under the table and handed it to me.

Q6. Now, who handed it to you?

A. Steve Ashton.

[fol. 353] Q7. Who was it said don't take that one?

A. Steve Ashton said that.

Q8. All right, C. W., what did you do then?

A. I read the pamphlet, and then we left and got in the cruiser and come back towards town.

Q9. Now, Sgt. Cook, was that an officer of the City Police at the time?

A. Yes, sir, he was.

Q10. And he is no longer here?

A. He's no longer here.

Q11. Do you know where he is?

A. Well, he quit and moved to Lexington. I don't know where he's working.

Q12. Now, did Steve Ashton show any reluctance at all, or did he hesitate, or did he refuse in any way to give you one of these pamphlets?

A. No, sir, he was free to give them to us. Wanted us to take one and read it.

Q13. Did you notice whether or not Sgt. Cook read this same pamphlet?

A. Yes, sir, he took one too. He also gave him one.

Q14. Now, Mr. Begley, I hand you here a pamphlet that has been introduced in evidence by Chief Bud Luttrell. I'll ask you to look through that and see if that is the identical pamphlet, or one identical to it, that was given to you that night by Steven Ashton, or that you read?

A. Yes, sir, it is.

Q15. Did you later on show that to Chief Bud Luttrell?

A. Yes, sir, I did.

Mr. Tolbert Combs: You can ask him.

[fol. 354] Cross examination.

By Mr. Dan Jack Combs:

Q1. Mr. Begley, when was this?

A. What day it was that I went down there?

Q2. Yes.

A. March 26th.

Q3. March 26th of what year?

A. 1963.

Q4. And what time of day was this?

A. Between 11:00 P.M. and 12:00 P.M.

Q5. Were you on duty at that time?

A. Yes, sir, I was.

Q6. Did you have your uniform on?

A. Yes, sir, I did.

Q7. Did you know Steve Ashton before that time?

A. I had seen him.

Q8. Did you know him?

A. I didn't know him personally.

Q9. Had you ever talked to him?

A. No, sir, I hadn't.

\* \* \* \* \*

Q11. In other words, you were a stranger to him?

A. Yes, sir.

Q12. And you were in uniform?

A. Yes, sir, I was.

Q13. Now, are you sure about this date, Mr. Begley?

A. It was March 26th when I went down there.

Q14. I'll ask you if you testified here at a former trial, did you not?

A. Yes, sir, I did.

[fol. 355] Q15. I'll ask you if these questions were asked you by Mr. Brown, John Y. Brown, who was assisting the Commonwealth at the time, and whether you made these answers?

"Q. Were you with the City Police Department on March 22nd, 1963?

"A. What was the date?

"Q. March 22nd, 1963.

"A. Yes, sir.

"Q. Prior to March 22nd, 1963, had you come into possession of a pamphlet of this young man over here, Steve Ashton, in which there was a reference made to Chief Luttrell, Sheriff Combs, and the editors of the Hazard Herald?

"A. Yes, sir.

"Q. Well, will you tell the jury, without me asking you any questions, just how you got in possession of that?

"A. Well, on March 22nd I went in Stacy's beer tavern with Sgt. Cook on regular patrol. I went in there, and there was some pamphlets, or papers, lying on a table, and I asked what it was, and he said literature. I asked him if I could have one and read it, and he said yes, sir, and I reached for it and he said 'no, don't take that one.'"

Were those questions asked you and did you make those answers?

A. You've got it wrong on the date because it was March 26th because he was arrested on March 27th of that morning.

Q16. I will show you the official transcript of these proceedings, Mr. Begley.

A. Well, I know what date he was arrested on, and I went [fol. 356] down there the night before.

Q17. If you testified at a former hearing that this occurred on March 22nd then you were in error?

A. They might have been printed on March 22nd, but I went down there on March 26th.

Q18. Then you were in error when you testified at the former hearing "well, on March 22nd I went in Stacy's beer tavern"?

A. I went in the 26th.

Q19. Now you say March 26th. Do you know why you said March 22nd at the former hearing?

A. They were printed up on March 22nd.

Q20. My question is why did you say you went in there—

A. I didn't say March 22nd. I said March 26th.

Q21. You do not care to see the official transcript of the proceedings?

A. Well, you can show it. I said March 26th. Do you want to dispute my word?

Q22. I'll ask you to look at page 122 of the Transcript, and read it to yourself, and tell the jury if you have not used the date, March 22nd numerous times?

A. Well, it says it was made up on March 22nd.

Q23. Go ahead and answer my question?

A. (Witness reading:)

"Had you come into possession of a pamphlet of this young man over here, Steve Ashton, in which there was a reference made to Chief Luttrell, Sheriff Combs, and the editors of the Hazard Herald? Yes, sir."

Yes, sir, that was my answer.

Q24. When was it you testified that you came into possession of that?

A. March 26th.

Q25. Does March 26th appear on that record?

[fol. 357] A. It says March 22nd. That's when it was made.

Q26. Now, does it say that prior to March 22nd? You know what prior means, do you?

A. Yeah.

Q27. That means before?

A. Yes.

Q28. "Prior to March 22nd had you come into possession of a pamphlet of this young man, Steve Ashton, in which there was a reference made to Chief Luttrell, Sheriff Combs, and the editors of the Hazard Herald?"

Did you answer: "Yes, sir."

A. That was after.

Q29. But this record doesn't show anything about the 26th does it?

A. No.

Q30. Then you go on down here and answer Question 6, you admit that you went into Stacy's tavern on March 22nd?

A. I go in it every night.

Q31. But you mentioned that you got that pamphlet on that night?

A. That's what it says here, but I went in there on March 26th. If you want to call me a liar about it, all right.

Q32. Your memory in September was a little more clear, was it not, as to things that happened in March than it would be here in the latter part of November, wouldn't it?

A. I've got it down pat that I went in there on March 26th.

Q33. But you testified the last time that you went in there on March 22nd, didn't you?

(Reporter's note: Witness made no answer to the above question.)

[fol. 358] Q34. How was Steve sitting when you went in?

A. He was standing.

Q35. Where did he get these pamphlets?

A. From under the table.

Q36. Now, a while ago, in response to a question by Mr. Combs, about Sgt. Cook, did you first say that he took one too, and later changed it that he also gave him one?

A. He give him one. I don't know what he done. I just noticed he had one. I can't testify for him. He'll have to testify for his own self.

Q37. And you didn't say anything or do anything to indicate to this young man that you were not acting in your official capacity as a policeman for the City of Hazard?

A. I was there to check out the tavern for disturbance.

Q38. And you were on duty, and you said before you requested this you did not tell him that you did not want this in the performance of your official duty?

A. He freely give me one.

Q39. My question, sir: Did you advise him that you were requesting that not in your official capacity?

A. Read that back.

Q40. Did you?

A. I don't understand your question.

Q41. When you asked this young man for this pamphlet, did you tell him that you were not acting as a policeman when you made the request?

A. I didn't tell him nothin'. I just asked him for it.

Q42. And you were standing there in uniform with your hat on?

A. Yes, sir, I was.

Q43. And he gave you one?

[fol. 359] A. Yes, sir, he did.

Q44. Was there any handwriting on it?

A. Yes, sir, there was.

Q45. Is that the one that's been filed there in evidence?

A. Yes, sir.

Q46. And then you took this back and gave it to Bud?

A. I gave it to Chief Luttrell.

Q47. And then I believe he sent you back, is that correct?

A. When?

Q48. That same morning?

A. No, sir, it wasn't me.

Q49. Who went back?

A. I don't know, sir.

Mr. Combs: I believe that will be all.

## Redirect examination.

By Mr. Tolbert Combs:

Q1. Mr. Begley, do you recall further on this occasion that Steve Ashton told you and Sgt. Cook to take them home and read them?

A. Yes, sir.

Q2. Did he make that statement to you?

A. Yes, sir.

Q3. What did he say? How did he say it—Steve Ashton?

A. He said: "Take them home and read 'em."

Q4. And you did read the pamphlet?

A. Yes, sir, I did.

Q5. And after you read it and saw the items in there about Mr. Luttrell and Charlie Combs, and all, you brought it to Chief Luttrell, is that right?

[fol. 360] A. Yes, sir, I did.

Q6. That's all.

## Recross examination.

By Mr. Dan Jack Combs:

Q1. Why didn't you testify on the first trial he told you to take them home and read them?

A. I did.

Q2. Huh?

A. I did.

Mr. Tolbert Combs: Look on page 126 at the top there, and you will find out.

Q3. You say that you did?

A. Yes, sir, I did.

Mr. Dan Jack Combs: Nothing further.

(Witness excused).

The witness, ANDERSON ASHER, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Tolbert Combs:

Q1. State your name to the jury.

A. Anderson Asher.

Q2. By whom are you employed, Mr. Asher?

[fol. 361] A. The City of Hazard.

Q3. As a policeman?

A. That's right.

Q4. Were you so employed in the month of March of this year, 1963?

A. I was.

Q5. Mr. Asher, do you recall in the month of March, pertaining to a pamphlet put out by Steve Ashton over there, and signed by him?

A. I do.

Q6. Did you receive a copy of that pamphlet from him?

A. I did.

Q7. Now, Mr. Ashton, without me having to ask you a lot of questions, go ahead and tell the Jury how this pamphlet came into your possession, and just what happened?

A. Well, on the morning of the 27th day of March, Sgt. Cook and I went to Allais road, and we stopped at Stacy's tavern and went in, and Foots was setting at the counter, and over in the corner there was a table with some tablets on it, and I asked Foots what they were, and he said: "Ah, just some tablets the boys fixed up." And I asked him if he cared if I got one, and he said: "Well, I don't see no reason why not." And I started to reach and get one off of top of the table and Steve Ashton said: "No." And he reached under the table and got one out and reached it to me.

And about that time Herb Stacy walked out, and I asked Herb, I said: "I heard that you all have got a few things in here about us." He sort of laughed, and said: "Well, I don't know." Said: "That's what I heard." I said: "Well,

"s find out what they are:" I went through it and found it, and it had gun-thugs in it, and I said: "Who in the hell do you all think you're calling gun-thugs?" And he said: "Well, not you, you've just been hired." Said: "You're one [fol. 362] of the younger ones."

I left then and came back in, and later on I was by myself, and I went up in Allais and as I came back out Steve Ashton there came out and flagged me down, and said: "I want to ask you something." I said: "Go ahead." He said: "I don't want Chief Luttrell to see that pamphlet." Said: "Because it will hurt Ira in his trial." I just kind of laughed and said: "If you think you're going to keep something like that quiet, you might as well forget about it." I said: "Because that will go all over Perry County."

Q8. Now, from your observation, Mr. Asher, was there quite a bit of talk about this pamphlet in the following days?

A. Yes, there was.

Q9. And that was spread around pretty much, wasn't it?

A. Yes, sir.

Q10. Pretty widely spread around?

A. Yes, sir.

Q11. Now, did Mr. Ashton give you this pamphlet voluntarily? You didn't tell him—I'm a policeman, I want you to give me that, or demand it in any way at all?

A. No, sir, he give it to me voluntarily himself.

Q12. Say you read it, Mr. Asher?

A. Yes, sir.

Q13. You did read it?

A. I did read it.

Mr. Combs: That's all I care to ask him at present.

Cross examination.

By Mr. Dan Jack Combs:

Q1. Mr. Asher, about what time was this?

[fol. 363] A. It was between 8:30 and 9:00.

Q2. When?

A. In the morning.

Q3. What day of the week?

A. Well, I couldn't tell you exactly. It was on the 27th day of March.

Q4. It was on the 27th?

A. Yes, sir.

Q5. Was officer Begley with you?

A. No, sir, Sgt. Cook was though.

Q6. Had officer Begley been there before you?

A. Well, he worked on the night of the 26th, and he was supposed to have picked his up between 11:00 o'clock and 12:00, before the beer tavern closed.

Q7. Were you in uniform?

A. Yes, sir.

Q8. Did you have your hat on?

A. Yes, I was on duty.

Q9. Did you know Steve? Did you ever talk to Steve before this incident?

A. Well, I stopped him once up here for running a stop sign, and he was lost. That was right after the flood, and he was trying to get to Walkertown, and I told him how to go around the highway to get there.

Q10. Now, when you requested this pamphlet, or tablet, did you indicate in any way that you were not acting as a policeman when you made the request?

A. Well, the way I stated it, I said: "Do you care if I have one?" So, I wouldn't say that that was trying to force it out of him. It was given to me of his own free will.

Q11. Could we say that you asked him for that much like you would ask me for my operator's license, if you wanted to check them?

[fol. 364] A. No, sir.

Q12. There was a different tone of voice?

A. Yes, sir.

Q13. Different manner?

A. Yes, sir. If I stopped you and asked you for your driver's license, I would put it in a different manner.

Q14. Why did you go up there that day?

A. Well, I just went up there just checking—just to keep trouble down.

Q15. Didn't Bud Luttrell send you up there?

A. He told me—on the way out there he radioed me and told me to stop there and see if there was some tablets there.

Q16. And, I believe you said, that they were not even stapled together?

A. Some were and some of them weren't.

Q17. And, I believe, you started to reach for one off of the top, and he said "no, not that one", and he reached under the table and gave you one? Is this correct?

A. I started to get one off of the table, and he said "no", and reached under the table and pulled one out and gave it to me.

Q18. Will you look at the exhibit there and see if that's the one that he gave you?

A. Sir, I couldn't tell you. There was hundreds of them just like it, but this is—

Q19. (Interrupting) Is there any writing on that one?

A. Sir?

Q20. Is there any writing on this one to identify it as the one he gave you?

A. It's marked.

Q21. Is this the one he gave you?

A. I couldn't tell you. There was hundreds of them.

[fol. 365] Q22. Now, you say, that he was standing up when you went in?

A. He was standing close to the door when I went in.

Q23. You say, the boy told you that he wanted to keep it quiet, he didn't want Bud to learn about it, is that right?

A. That was later on.

Q24. And, I believe, you also testified that this was widely circulated throughout the county. Isn't it a fact that Bud Luttrell, Mrs. Nolan and Sheriff Combs are largely responsible for this circulation?

A. I wouldn't say that.

Q25. You don't know of this boy talking about it, do you?

A. No.

Mr. Combs: Nothing further.

Redirect examination.

By Mr. Tolbert Combs:

Q1. You know he wrote about it, don't you?

A. Yes, I do.

Recross examination.

By Mr. Dan Jack Combs:

Q1. Did you see him?

A. Yes, he was stapling it together when I went in.

Q2. Did you see him write it?

A. That's his signature.

Q3. I thought you said that there was no writing on the one that he gave you?

A. You asked me did I mark it.

[fol. 366] Q4. My question was was there any writing on it?

A. You asked me did I mark it. You did not state if there was any writing on it.

Q5. Was there any writing on the one he gave you?

A. Yes.

Q6. Is this the one he gave you?

A. No, the one he gave me had his name signed to it.

Q7. I'll show you a signature here, and ask you to look at that and tell the Court and Jury whether or not that's the one he gave you?

A. I'm not a handwriting expert, so I couldn't state that.

Q8. You don't even know if that's Steve's handwriting, do you?

A. He was sitting there writing when we went in.

Q9. You don't know what he was writing?

A. He was fixing these up.

Q10. Those are mimeographed, aren't they?

A. This is mimeographed here.

Q11. That isn't the one he gave you? You don't know who wrote that?

A. I don't know who wrote any of it.

Mr. Dan Jack Combs: Nothing further.

A. But he is the man that signed it.

Redirect examination.

By Mr. Combs:

Q1. Steve Ashton's name does appear on the pamphlet—

A. It does.

Q2. —that he gave you that night?

A. It did.

[fol. 367] Q3. Now, Mr. Asher, you spoke a while ago about Herbert Stacy being there. Was he present when this young man here was talking?

A. He was.

Q4. Did Mr. Stacy there, in the presence of Steve Ashton, did he appear to know what was already in this pamphlet that you read?

A. He did, by his appearances.

Q5. What indication did he give you that he knew what was in the pamphlet—that he had already read it?

Mr. Dan Jack Combs: Object to any indication of what somebody might have said or done.

The Court: I'll let him tell what he did that caused him to think he knew.

(To which ruling of the Court Counsel for the Defendant excepts).

Q6. What did he do that caused you to believe that he had already read the pamphlet?

A. Well, I asked him, I said: "I hear you all have got something in here about us." He sort of laughed, and said: "Yes, I think so."

Mr. Tolbert Combs: That's all.

Recross examination.

By Mr. Dan Jack Combs:

Q1. Something you all have got in here about us?

A. Yes.

(Witness excused).

[fol. 368] Mr. Tolbert Combs: The Commonwealth announces through in chief.

(Reporter's note: The following motion, response, and Court's rulings, etc., were heard in chambers and out of the presence and hearing of the jury).

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Dan Jack Combs: At the conclusion of the Commonwealth's evidence, the defendant moves the Court for judgment of acquittal, and for grounds therefor, says that we feel that the Commonwealth has failed to prove the essential elements of the crimes of criminal libel, to wit: A malicious publication.

As to the evidence of malice, they have absolutely failed to show any malice on the part of the accused. All of the witnesses testified—the witnesses testified—the witnesses that were supposed to have been libeled said they didn't know the boy. I say, maliciousness is an essential element of the crime. I feel they have wholly failed to prove this element.

Second, we feel that they have failed to prove publication. Mrs. Nolan said she found it in the door. She doesn't know where it came from. She doesn't know who put it there. If I write a libelous material concerning Tolbert and deliver it to Tolbert, I have not libeled Tolbert. If Tolbert delivers it to your Honor, it is his publication, and not mine.

The Court: You're right there.

[fol. 369] Mr. Dan Jack Combs: As to this question of Mr. Nolan, I think there's clearly no publication.

As to the officers, there's some confused testimony. Here is a young man seated at a table in this establishment. An officer comes in and says I want one of these. Is this publication? This is a man with apparent authority to confiscate. He brings it back, and that sets the wheels in motion. Bud sends back for more. When he gets more of these pamphlets, they call in everybody and have a great big session about it. They go up there and arrest this boy and confiscate all of this material. If there's any distribution, I submit to his honor that these prosecuting witnesses have done the oration.

The second officer admitted that this man said don't let them see it, it might hurt Ira. I feel that this actually falls far short of publication. Here you have officers coming in and requesting it. They don't indicate to him in any way that they wanted some reading material. They appeared to be officers.

The Court: But sent them after it himself. He testified that.

Mr. Dan Jack Combs: That's right. The man was under orders when he went to get it. I feel that this is certainly not publication. Third, Your Honor, criminal libel differs, naturally, from civil libel. The Constitution of the United States, and of this State, gives a person the right of Freedom of Speech, and this, perhaps, is one of our most sacred rights, the right to say and to write what we please, what [fol. 370] we believe.

Now, there's some limitations imposed upon this. Certainly, if it tends to degrade, or injure, one, or it is libelous per se, I submit that the things here are not libelous per se, but this may be an action in tort, but to reconcile the First Amendment, the Fourteenth Amendment, and our Kentucky Constitution, with the State's power to punish, we must have the element more stringent than civil. There

must be an imminent and present danger of inciting violence, or riot, or to commit a breach of the peace, and I submit, Your Honor, that none of these things, if they were false, fall within this category. They are taking the position that they are false, and therefore, he is guilty of criminal libel. This runs square afield from both the State and the Federal Constitutions.

Now, there's another element in this case. It was incumbent upon the Commonwealth to prove the falsity of these things. This they have failed to do. By conclusion, they said, yes, it's false, but on cross examination point by point, each of the prosecuting witnesses admitted that there was truth.

Now, in libel, and here again, is from the First Amendment, you can't take things out of context—take them and treat them abstractly, and this is what they're attempting to do. So, I submit, Your Honor, that they have failed to prove that this matter—this alleged libelous matter, assuming that it were libelous, and assuming that it did tend to provoke a breach of the peace, or incite a riot, or corrupt the public morals; assuming that the writing did do that, [fol. 371] they have failed to prove that these things were false, and I submit that the prosecuting witnesses themselves have categorically admitted the substance of the truth. Now, there's some inflection, some interpretations, but basically, everything this boy said was true.

Now, about the \$5,000.00 fine, this was error. It was a \$5,000.00 judgment.

Mr. Tolbert Combs: Well, that was false, wasn't it?

Mr. Dan Jack Combs: Yes, but see, you can not close my mouth. You can not make me tell the truth all the time, because that violates the First Amendment and the Fourteenth Amendment, you see. If you close my mouth by a criminal process—you may close it by a judgment against me, but if you close my mouth, you must prove that what I said was not only false, but that my saying it was a danger of disrupting the peace and harmony, and this falls far short of that.

Now, these people—they say they have been degraded. They don't know how they have been degraded. Bud is still chief. Charlie still has the support of the rich and the poor, and Mrs. Nolan is still a highly respected editor.

I feel that we are entitled, and in view of the burden upon the Commonwealth to prove these essential elements, and their failure to do it, I believe we are entitled to a directed verdict of acquittal, Your Honor.

Mr. Tolbert Combs: I want to say that the Constitution [fol. 372] of the United States, or the Constitution of Kentucky doesn't give me, or anyone, the privilege of going around saying false things about people. Now, getting to the falsity of these things, the Court remembers very distinctly what was alleged, what was printed in this pamphlet about Mrs. Nolan, about Charlie Combs, and about Bud Luttrell. They were all denied and stated that they were false, with the exception of the judgment, and he says that there was a fine, and the Court remembers that. There wasn't any of these statements—he says that Charlie Combs beat a man up in the jail. Charlie Combs wasn't even there.

The Court: He was responsible for what his deputies did.

Mr. Tolbert Combs: Well, he wasn't there. He said he did it. He wasn't there. He is responsible for his deputies. That's the reason they obtained a judgment for \$5,000.00 against him, and his bondsman, but he wasn't there, and this pamphlet says that he did it. That's false. You can't get around that.

The Court: Well, he didn't do it personally.

Mr. Tolbert Combs: Now, as to distribution. It doesn't have to be all over Perry County, or all over the United States. However, within a short time—I assume—they had these things addressed, all they had to do was place them in the mail. I assume they would have.

[fol. 373] The Court: You can't go into that because they hadn't done it.

Mr. Tolbert Combs: They had the things there and had them addressed.

The Court: You might be going to commit murder to-night, but we can't convict you of it until you do it.

Mr. Tolbert Combs: But regardless—the policeman didn't demand one of these things. They didn't say give them to me, or you've got to, or didn't take one. They testified that he voluntarily gave them one.

The Court: They asked for it.

Mr. Tolbert Combs: But that wasn't any demand for anything. He voluntarily gave them one, and what did he say that Ashton said after he went up in the holler and came back, said—don't give that to Chief Luttrell because there's some things in there that might hurt Ira Kilburn in his trial. Now, if this isn't a case under criminal libel, I can't conceive—I can't conceive of this case being taken away from the jury. A man coming down here, not knowing what he's printing—not knowing what he's printing. I don't know whether he's going to take the stand or not, but if he's got any explanation for it, all right. He should know what he was printing. He was just printing what somebody was telling him and three-fourths of that stuff, all except one or two statements that he printed, is absolute [fol. 374] false, and it has been proven in this case.

The Court: He came pretty close on Mrs. Nolan.

Mr. Tolbert Combs: Judge, I'm inclined to disagree with you.

The Court: You've got a right to do that.

Mr. Tolbert Combs: I'm inclined to disagree with you.

The Court: She hadn't given the pickets but Eleven Hundred Dollars, and she hadn't distributed all of the things that had been sent. She does have part of them left, and what she's going to do with, God Almighty only knows. I don't.

Mr. Tolbert Combs: Well, if I understood her testimony, Judge, they appointed a committee here with three, or four, or five people on it, and I don't think she was on the committee.

The Court: Oh, but she's taking credit for the Hazard Herald.

Mr. Tolbert Combs: She might be taking credit for it, but the Committee decided who was to get that money, and who was to get the clothes. Now, as to the money, she was designated, if I understood her testimony, to write the [fol. 375] checks, but the Committee decided who was to get that, and I assume that the Committee, there's three, or four, or five on it—I don't know just how many. I assume that they authorized it, and if there's any money left that they know where it's at and how much there is, and if the proper people come to get it, I assume that they can still get it. I don't know.

The Court: I don't know. It's been a long while and they haven't got it yet.

Mr. Tolbert Combs: I don't know either.

The Court: I say, they haven't gotten it yet, and that's been a long while.

Mr. Tolbert Combs: That might be true, Judge. I don't know. I know less about that than anybody.

The Court: I just know what she testified in there. I'm going to let it go to the jury, as of now, but I'm very sympathetic with what Mr. Combs, Attorney for the defendant, has said in this case. It is thin—real thin, but I'm going to overrule his motion and let him put on his evidence. Show his exceptions.

Mr. Dan Jack Combs: Your Honor, I would like to show that I was heard yesterday on another motion.

The Court: All right.

[fol. 376] Mr. Dan Jack Combs: Well, just say that yesterday the matter of motions to dismiss the indictment came to be heard again on the grounds set forth in the original and amended motion to dismiss, and the Court after hearing the parties, overruled said motions, to which the defendant objected and excepted.

# OPENING STATEMENT TO JURY ON BEHALF OF THE DEFENDANT

Mr. Dan Jack Combs: May it please the Court:

The Court: Mr. Combs:

Mr. Dan Jack Combs: Mr. Combs, and you ladies and gentlemen of the jury:

As Mr. Combs has told you, and you heard during the time you were being selected, this is a case wherein the Commonwealth has accused the defendant, Steve Ashton, of the offense of criminal libel.

It is our position that the offense of criminal libel is that a party must maliciously write false, and publish—that is, publish to a third party, things said against another person that would tend to create a breach of the peace—

Mr. Tolbert Combs: Now, your Honor, I would like to impose an objection. His opening statement pertains to what he expect to prove, not what the law is in this case. [fol. 377] The Court will give that, if I understand it. I think his statement should be confined to what he expects to prove.

The Court: I think you're right about that. Don't argue the case.

Mr. Dan Jack Combs (Continuing). We expect to prove that this young man was a student at Oberlin College, and, like so many millions of Americans, he saw this television program which showed the world the suffering existing, not only in your county, but over in my county, among the unemployed coal miners and their families. We will show that as a student at this college, he, as well as other students, arranged for some food and clothing. He brought this down here on a mission of mercy, and he stayed a few days.

Then he went back, and after seeing the condition, he was responsible—the school was responsible for sending a great deal more down to help the suffering and the needy.

Some time in March he came back down a second time, and he saw first hand some of the problems of the people

that were suffering, and some of the forces that were opposing them.

Now, we're not going to deny that Steve Ashton wrote this pamphlet. It will be our position that he did not publish it—that is, to a third party; that if there was publication, if it went to third parties, then Mrs. Nolan, or Mr. Combs, or Mr. Luttrell did that.

We will be able to show, and you will have the exhibit with you if you need it in the jury room, there is no malice in this. He is merely attempting to help the needy, and to [fol. 378] point out to people how desperate the need was.

It will be our position that he did not publish it, and publication is as vital to an action of this nature as any other element.

Second, we expect to prove that this was not false. This was true. The burden was on the Commonwealth to prove it. We will be able to show that much of what they regard as false, is true.

Our next phase of the case is that there was nothing said that he did not have a right to say under the Constitution. I think, after you have heard the evidence and instructions of the Court, that you will believe, as I believe, that this young man was merely trying to help. He had no malicious motives. He wasn't trying to hurt anybody, and he was merely trying to help.

I thank you.

The Court: Call the first witness for the defendant.

Mr. Dan Jack Combs: Mrs. Sylvia Ashton.

---

The witness, MRS. SYLVIA ASHTON, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Dan Jack Combs:

Q1. Would you give your name to the Court, please.

A. Mrs. Sylvia Ashton.

Q2. I believe you are the mother of Steve Ashton, is this [fol. 379] correct?

A. That's correct.

Q3. Mrs. Ashton, where do you live?

A. I live in New York City.

Q4. In March of this year what was Steve doing prior to—well, say, in February of this year, where was he and what was he doing?

A. He was in Oberlin College. He was a student.

Q5. Where is this college?

A. In Ohio.

Q6. Prior to going to Oberlin, where did Steve go to High School?

A. He went to High School in North Hollywood, California.

Q7. How old is Steve, Mrs. Ashton?

A. Steve was 21 May 7th.

Q8. Of 1963?

A. Yes sir, this year.

Q9. During elementary and high school, Mrs. Ashton, did Steve attend school regularly?

A. Oh, yes, he attended school regularly.

Q10. Did he participate in any civic and school affairs?

A. Yes, as a matter of fact, Steve was very active in school affairs. You say civic affairs. In the school, he was on the student's council, and he was deeply involved in athletics, and all sorts of activities that the average normal boy is interested in, and he did very well in school, and in his studies, as well.

Q11. How long had Steve been going to Oberlin College?

A. I think, it's two and a half years, until that semester.

Q12. While Steve was growing up, and while he was at home with you, was he in any trouble, or did he cause any disturbance, or what type of a boy was Steve?

A. If Steve caused any disturbance it was only to the [fol. 380] members of the opposing teams of Little League baseball, or Pony League baseball. He did this, and he

played on the teams, and I would not say that he caused any trouble, really.

Q13. Was Steve a very studious boy?

A. He was studious in—I'd say, on an average level. He wasn't studious to the point where he would rather study, let's say, than to go baseball practice. He went to practice and he did his studying. He wasn't what they call a grind.

Q14. Was he active in school affairs? Did he hold any offices in the schools that he attended?

A. Yes, he was very active in school affairs. I think, beginning in Junior High School, he was the officer of his class on a few occasions, and in High School, he was President of the Senior Class, and delivered the President's message on graduation day. He had a very nice school record, a record that I, as his mother, am proud of.

Q15. Did Steve attend church and Sunday School, Mrs. Ashton?

Mr. Tolbert Combs: Your Honor, I want to object to that. They've gone far enough on that. That don't have a thing on earth to do with this case at all.

Mr. Dan Jack Combs: You may ask her. I will withdraw the question.

Cross examination.

By Mr. Dan Jack Combs:

Q1. Now, Mrs. Ashton, you've kept quite a close tab on your son for all these years, haven't you?

A. Yes, sir, close tab. We've had a good relationship. Do you mean that?

[fol. 381] Q2. And you kept close tab on him while he was in college up at Oberlin this two and a half years?

A. Yes, sir.

Q3. He was in college in Oberlin, Ohio?

A. That's correct.

Q4. Now, did you learn that he was expelled from Oberlin College because he organized a group against the House UnAmerican Activities Committee?

A. That's incorrect.

Q5. Did you learn that?

A. No, sir, he was never expelled.

Mr. Dan Jack Combs: I would like to object.

The Court: Overruled.

(To which ruling of the Court counsel for Defendant' excepts.)

Mr. Dan Jack Combs: Go ahead and answer the question.

A. I never learned it because it never happened. Steve was never expelled from Oberlin.

Q6. Then you don't say that he wasn't or was expelled because he had organized a group on the campus of Oberlin College to fight the House UnAmerican Activities Committee?

A. I'm saying—

Q7. Are you saying he was, or he did?

A. I'm saying two things: I'm saying he was not expelled, and I'm saying that he was not expelled under those grounds at all.

[fol. 382] Q8. Are you saying—

Mr. Dan Jack Combs: I object to him arguing with the witness. I fail to see the materiality.

Q9. —on the campus of Oberlin College he didn't organize a group to fight the House UnAmerican Activities Committee? Are you saying that?

A. Would you remind repeating that question.

Q10. Are you saying that he didn't organize a group of people on the campus of Oberlin College to fight the House UnAmerican Activities Committee?

Mr. Dan Jack Combs: I object.

The Court: I'll sustain that objection. I don't think it is material whether he did or not.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

Q11. Now, when he left Oberlin College, where did he go to?

A. He came here on a visit—came to Hazard.

Q12. Came to Hazard?

A. He came to Hazard in response to an appeal that the people of the nation heard about the terrible times that the people of Hazard—

Q13. Well, did they appeal to him personally, or did he just see some program, or hear it on the radio or read it in the newspaper?

Mr. Dan Jack Combs: I ask that the witness be permitted to answer.

[fol. 383] The Court: Let her answer. Go ahead.

A. The appeal was made on a national network, and, I think, everybody is aware of this. It affected all people who wanted to do something helpful to those who needed it.

The students in colleges all over the country formed committees to bring food and clothing, and do what they could. This was happening at Oberlin, as well as in many schools. My son, Steve, was involved in this. I am very happy to say this, because it was so desperately needed, and this is how he came to Hazard.

Q14. What was so desperately needed, Mrs. Ashton?

A. Help, food, clothing.

Q15. Where?

A. Right here.

Q16. How do you know? Were you down here?

A. We had a documentary that we—

Q17. (Interrupting.) Oh, you're just going by what somebody told you, that there was a desperate situation down here, is that right?

The Court: Everybody that saw that TV program would have a pretty good idea of what was going on here, I think. I saw it, and, I suppose, a good many other people saw it.

Q18. Well, there wasn't anybody here in this county that appealed directly to your son to come down here and relieve this situation, to your knowledge, was there, Mrs. Ashton?

A. Sir, when people are in trouble and hungry—

Q19. (Interrupting.) Just answer my question yes or no, and we'll get along faster.

A. No, they don't need any personal requests for help.

[fol. 384] Q20. Did he enter the Tougaloo Southern Christian College for Negroes in Mississippi?

A. No, sir, there is no such college.

Q21. Is there a Southern Christian College in Mississippi, Tougaloo, Mississippi?

A. Tougaloo.

Q22. Tougaloo, well, all right, Tougaloo.

A. Tougaloo Southern Christian College.

Q23. Did he enter that college?

A. No, sir.

Q24. Did he go there?

A. He went as an exchange student.

Q25. He did go there then as a student, didn't he?

A. As an exchange student.

Q26. Well, it was as a student, wasn't it, Mrs. Ashton?

A. No, sir. I must qualify it. It was an exchange student while he was a student at Oberlin. All colleges exchange students from time to time, and this one did too.

Q27. Well, I'll ask you this, Mrs. Ashton, and you can answer it yes or no: Did your son, Steve Ashton, enter the Southern Christian College for Negroes at Tougaloo, in Jackson, Mississippi?

A. As a student?

Q28. Enroll as a student, yes?

A. The answer to that is no, sir.

Q29. All right. Has he ever enrolled in Tougaloo?

A. No, sir.

Q30. Do you know a professor down there by the name of John Salter?

A. I never met professor John Salter, but I know about him.

[fol. 385] Q32. Do you know of him?

A. Yes, sir.

Q33. Who is he?

Mr. Dan Jack Combs: I fail to see the materiality of this, Your Honor.

The Court: Well, the Court does too, but I'll let her answer it.

(To which ruling of the Court Counsel for the Defendant excepts.)

Mr. Dan Jack Combs: Go ahead and answer the question, Mrs. Ashton.

A. As far as I know, he is a very highly respected scholar and teacher.

Q34. Well, do you know of any reason why your son would give his address on the back of that pamphlet there?

A. Steve was planning to go down there to do special study with Dr. Salter.

Q35. And on this pamphlet, he did give this Salter, a professor there at this colored college, as a place for them to direct their answers to his pamphlet? Did he do that, Mrs. Ashton?

A. I don't know about that.

Q36. Mrs. Ashton, on this pamphlet here signed by your son, Steve Ashton, it does give, and states: "Write: Steve Ashton, c/o Salter, Tougaloo College, Tougaloo, Mississippi." Is that what it says there?

A. Yes, sir, it says that.

Q37. Do you know of any reason why he would give this Salter as his forwarding address?

A. I stated the reason a moment ago. He was planning to [fol. 386] go there and do special study with Dr. Salter.

who is a very learned man, and a man with whom Steve felt that he could learn a great deal.

Q38. Is your son eligible to re-enter Oberlin College?

A. Yes, sir, he is.

Q39. Is he planning to re-enter?

A. He is planning to do that, yes, sir.

Q40. Mrs. Ashton, do you have any business interests in Eastern Kentucky at all?

Mr. Dan Jack Combs: Object.

The Court: That's immaterial.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

Q41. Does your son have any business interest in Eastern Kentucky?

Mr. Dan Jack Combs: Object.

The Court: I don't think it is material whether he has or not. I'll let her answer if she knows.

(To which ruling of the Court counsel for the Defendant excepts.)

A. No, we have no business interests here. We have no business interests anywhere, Your Honor. We work like everybody else.

Mr. Tolbert Combs: That's all.

[fol. 387] Redirect examination.

By Mr. Dan Jack Combs:

Q1. Mrs. Ashton, what is the relationship between Oberlin College, and Tougaloo Institution at Jackson?

A. The relationship, as I understand it, is this: Perhaps, very early in the 1900's Oberlin College helped found this college in Mississippi, because there wasn't an accredited college there.

Q. Is Oberlin a Christian School?

A. Oberlin was founded originally—yes, but, it is, of course, non-sectarian.

Q3. Now, explain to us—I don't full understand—what is meant by an exchange student. You say, Steve was down there for a short while as an exchange student. What do you mean by that?

A. This simply means that students are selected, perhaps, five or six, or a dozen, or more, and their opposite number at the college—the college is arranging this, or both colleges are arranging it—they are sent to the one school, and the others, Steve including, was sent to their school. They stay for a period of, I think, it is ten school days, which is two weeks. They go to the classes and they observe, and they exchange ideas, and in this way, the theory is, that American children, American students will have a better understanding of their fellow-Americans in other part of the country, and also, the way other schools operate than their own, and they are given credit, school credit for their stay, and when they return they write reports. That's the meaning of an exchange student, as I understand it.

Mr. Dan Jack Combs: Nothing further.

Recross examination.

By Mr. Tolbert Combs:

Q1. This school at Tougaloo is predominantly a colored [fol. 388] school, isn't it?

A. It is in an area—yes, sir.

Q2. Had he been there more than once? Had he been there before?

A. He had been there only as an exchange student.

Q3. More than one time?

A. No, sir.

Mr. Tolbert Combs: That's all.

(Witness excused.)

The witness, IRA KILBURN having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Dan Jack Combs:

Q1. Would you give your name to the Court please.

A. Ira Kilburn.

Q2. Where do you live?

A. Wabaco.

Q3. Is that here in Perry County?

A. Yes.

Q4. Were you ever an employee of the Police Department of the City of Hazard?

A. Yes, sir.

Q4. How long were you with the department?

A. In the neighborhood of eight years.

Q5. When did you last work in the Police Department?

A. I'd say, February 1st.

[fol. 389] Q6. Of what year?

A. This year.

Q7. What was your position, or rank, at this time?

A. Lieutenant.

Q8. Were you working under Chief Bud Luttrell?

A. That's right.

Q9. In a conversation with Bud Luttrell, did he ever tell you that your life was in danger?

A. Yes, sir, he told me that if I didn't make a move I would be killed, and I made the move.

Q10. Did he tell you who was going to try to do away with you?

A. George Smith and R. D. Cisco.

Q11. Were they with the Police Department at the time?

A. George Smith was, and still is.

Q12. Do you know whether or not any of the pickets at the time ever guarded your home?

Mr. Tolbert Combs: I object, Your Honor. That has nothing to do with this case.

The Court: Overruled.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

A. I can only answer that question as to what another man told me.

The Court: Don't answer it then.

Q13. Well, do you know, from your own personal knowledge, [fol. 390] edge, whether or not they guarded your home?

A. I don't know that.

Q14. Did Bud Luttrell have anything to do with the fact that you are no longer connected with the police department?

Mr. Tolbert Combs: Object.

The Court: I'll sustain that objection.

(To which ruling of the Court Counsel for the Defendant excepts.)

Mr. Dan Jack Combs: You may ask him.

Mr. Tolbert Combs: I don't care to ask him.

(Witness excused.)

---

The witness, GARRET WHITE, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Dan Jack Combs:

Q1. Would you give your name to the Court please.

A. Garret White.

Q2. Mr. White, where do you live?

A. I live on Grapevine. Lamont is the post office.

Q3. Is that here in Perry County?

A. Yes, sir.

[fol. 391] Q4. What is your occupation?

A. I'm a miner. Preach on weekends.

Q5. You are a Minister?

A. Yes, sir.

Q6. Mr. White, did you take an interest in trying to help the needy unemployed coal miners and their families during last winter?

A. Yes, sir, I did.

Q7. Did this interest—were you associated with Mr. Nolan of the Hazard Herald during this period?

A. Well, at the beginning when the material begin to come in here, I was. Then I was set aside later on.

Q8. Did you apply to the Hazard Herald, Mrs. Nolan, and the Committee here for money, food and clothing to be given to these unemployed coal miners?

A. Well, I was asked to make a statement—

Mr. Tolbert Combs: Object.

The Court: Sustained. Just answer his question.

(To which ruling of the Court Counsel for Defendant excepts.)

Q9. Who asked you to make a statement?

A. I believe, it was a Mrs. Hatmaker.

Q10. Is she with the Hazard Herald?

A. Yes.

Q11. What request, or statement, did she make?

Mr. Tolbert Combs: Object.

[fol. 392] The Court: Overruled.

(To which ruling of the Court counsel for the Commonwealth excepts.)

Q12. Go ahead. What statement did she request that you make?

A. Well, I believe, at the time it was Twelve Thousand Dollars (\$12,000.00) supposed to have been in the hands of the Committee—

Mr. Tolbert Combs: Object.

A. Well, that's what they told me. I never seen that now. That's just their word, and, I don't know how much clothing and other material, and—

Mr. Tolbert Combs: I'm objecting, your Honor, because what he knows about that is what he heard somebody say.

The Court: If Mrs. Hatmaker told him, she is part of the Hazard Herald, or connected closely with it, and with Mrs. Nolan, and, I think, she was on the Committee, as well as I remember, distributing this stuff, and I'll let her answer.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

A. I made the statement that this was for everybody, men that was pickets, and anybody that was in need of it. Then I met in a meeting, and the foundation of it was mentioned, and when I had my chance to speak, one minister said it didn't have any foundation, and I spoke of the foundation of it being the picket line, and I was asked to [fol. 393] leave, and I never did get anything.

Q13. Did you make a request of the Hazard Herald Helping Fund for money, food and clothing for miners—members of the picket lines, and their families?

A. I made a request for everybody.

Q14. Did you receive from this group any help whatever, whether it be clothing, food, or money?

A. I received nothing.

Mr. Dan Jack Combs: You may ask him.

(Witness excused.)

Cross examination.

By Mr. Tolbert Combs:

Q1. Mr. White, you weren't requesting anything for yourself, were you?

A. No, sir, I didn't need it.

Q2. It was for the needy people?

A. That's correct.

Q3. And whether they were on the picket line or not on the picket line, you were making that request?

A. That's what I was doing.

Q4. Now, was there a Committee formed, Mr. White, to disburse this clothing and this money?

A. Yeah, and the preachers that was out of town like—well, I might mention some of their names, like Brack Feltner, and different ministers, turned their needy families in to me, and I would turn these papers into Mrs. Nolan, but then after I was set aside I had no right to help anybody any more, and if they ever got anything, I don't know it.

[fol. 394] Q5. Then there was a Committee appointed to disburse that. There was a committee formed to come to you with the stuff, and you were to come into the Herald? Is that right?

A. Yeah, I was the committee to distribute to these other places.

Q6. But there was another committee formed here, consisting of the County Attorney, Calvin Manis, and other people here, is that right, Mr. White?

A. I was set aside. I don't know.

Q7. You don't know anything about that?

A. No.

Q8. Mrs. Nolan never refused you anything at all because you made no request, did you?

A. Yeah, I went in there different times, but I never did get anything. I kept taking papers in there, and they finally just told me, said don't bring in no more.

Q9. But at that time hadn't there been a committee, including the county attorney, and other people, to disburse that stuff, Mr. White, or do you know?

A. Well, I didn't know I was ever set aside, I had about two hundred and fifty (250) letters through the mail, you know, and that would have covered about fifteen hundred (1500) people. I had all their names, and I didn't know I

was set aside until the lady told me not to turn in any more papers.

Q10. Do you know whether or not Mrs. Nolan was on that committee?

A. I don't know anybody that was on the committee.

Mr. Tolbert Combs: All right, that's all.

[fol. 395]            Redirect examination.

By Mr. Dan Jack Combs:

Q1. Mrs. Nolan is the one that told you not to bring in any more papers?

A. Yes, sir.

Mr. Dan Jack Combs: All right, you may stand aside.

(Witness excused.)

---

The witness, CHARLES MOORE, having been first duly sworn, testified as follows, on

Direct examination.

By Mr. Dan Jack Combs:

Q1. Would you give your name to the Court please.

A. Charles Moore.

Q2. Where do you live?

A. Combs, Kentucky.

Q3. Charles, have you been in this picket movement here in Perry County since it commenced?

A. Yes, I have.

Q4. Are you a member of the Miner's Relief Committee?

A. Yes, I am.

Q5. Do you know the defendant, Steve Ashton?

A. Yes, I do.

Q6. When did you first meet, or see, Steve Ashton?

A. Well, the first time that I saw him was at the Allais union hall.

Q7. How long ago was this?

A. Well, exactly the date on this, I couldn't say the date.

[fol. 396] Q8. Do you remember the time that he was arrested here?

A. Yes, sir.

Q9. In relation to that time, how long before was it that you had seen Steve for the first time?

A. I'd say, a couple of months.

Q10. What were the circumstances of this visit, or this meeting?

A. You mean, when I first met him?

Q11. Yes.

A. He told me that he wanted to get hold of somebody that he could turn this stuff over to.

Q12. What stuff is this?

A. Some food and clothing.

Q13. Did you learn where he was from?

A. He told me that he was from Oberlin College.

Q14. How did he travel down here? How did he come down here?

A. He come down in a car.

Q15. Did he turn the food and clothing over?

A. Yes, he did.

Q16. Who did he turn it over to?

A. He turned it over to me.

Q17. What has been done with this food and clothing?

A. It was distributed out to the pickets.

Q18. How long was he here on this occasion?

A. I'd say, at that time, about a month.

Q19. When did you next hear—did he then go back to school, so far as you know?

A. Yes, he did.

Q20. Did your committee receive any additional food and clothing from Oberlin College?

A. Yes, we did.

[fol. 397] Q21. How long after Steve left here was it you received this additional food and clothing?

A. Well, it wasn't too long. I don't remember just exactly how long it was, but it wasn't too long.

Q22. How was it brought in here, by box car, or by truck, or cars?

A. It was brought in by truck.

Q23. Was there very much of it?

A. Yes, there was quite a bit of it.

Q24. What happened to this food and this clothing?

A. We distributed it out to the pickets.

Q25. Now, when did you next see Steve?

A. Well, along after this last food came in, that's when Steve came back, and he stayed about a month, or maybe longer than that.

Q26. Well, the first time he was here, when he came in with the first food and clothing, how long did he stay—do you know?

A. He didn't stay, I don't think but a short time the first time.

Q27. Now, do you know Ira Kilburn?

A. Yes, I do.

Q28. Do you know where Ira lives?

A. Yes.

Q29. I'll ask you, Sir, if before March 22nd if you and any other pickets ever guarded Ira Kilburn's home at night?

Mr. Tolbert Combs: Object, your Honor. I don't see that that's competent. That's before the 22nd.

The Court: I'll let him answer.

[fol. 398] (To which ruling of the Court Counsel for the Commonwealth excepts.)

A. Yes, we did.

Mr. Dan Jack Combs: You may ask him.

Cross examination.

By Mr. Tolbert Combs:

Q1. Charlie, were you present down there at Herbert Stacy's home and place of business when these pamphlets were printed and put together?

A. I was there when some of them were.

Q2. You've seen one of those pamphlets, haven't you, Charlie?

A. Yes.

Q3. And you were down there, and, you say, you've seen them down there?

A. Yeah.

Q4. I'll hand you one here, Charlie, and ask you if this isn't the pamphlet that was printed down there?

A. I couldn't say whether it was printed down there or not.

Q5. You did see this pamphlet there in Herb Stacy's place, didn't you?

A. Well, I don't know whether it was that one or not, but I seen one similar to it.

Q6. Well, I mean, a pamphlet—not this particular one, but a pamphlet with this same material in it—you've seen it and read it?

A. Yeah.

[fol. 399] Q7. And this was given to several of the pickets down there at Herb Stacy's place, and they all read it, is that true, Charlie?

A. I don't know.

Q8. After Steve Ashton printed them up down there and put them together, weren't they distributed amongst the pickets down there and they all read it?

A. I didn't see none of them passed out.

Q9. You didn't see any passed out, but did you see any of them reading it?

A. I saw some of them down there in Herb's place.

Q10. But Steve Ashton, he did print this stuff up and put it in pamphlet form there and put it together?

A. I couldn't say that he did print it. I seen some after they were printed. I don't know who printed them.

Q11. Did you see him there stapling them together, Charlie, and putting them together, putting the addresses on them, and all?

A. Yes.

Q12. You saw him doing that?

A. Yes.

Q13. Now, Charlie, you say, that this truck load of clothing and food, and stuff, came in here from Oberlin College. Was that before this CBS TV program went on that everybody over the country saw?

A. I ain't for sure, but I believe it was.

Q14. At that time the Hazard Herald had never entered into the distribution of this relief stuff, food, clothing and money that came in?

A. I couldn't say for sure whether they had or not.

Q15. Well, in other words, the stuff that came in here that Steve sent in, or someone sent in from Oberlin College, it came in before this CBS television program?

A. I wouldn't say. I don't know for sure whether it was before or after.

[fol. 400] Q16. Well, to the best of your memory?

The Court: Go ahead and tell if you know. If you don't know, just say so.

A. I don't remember whether it was before or after.

Q17. You didn't testify in the case before, did you, Charlie?

A. No.

Mr. Tolbert Combs: That's all.

Redirect examination.

By Mr. Dan Jack Combs:

Q1. Did you ever hear of a publication called the Miner's Voice, a paper?

A. Yes.

Q2. Now, this had been something that had been printed up down there and had been circulated among the pickets for a long time before Steve came here, wasn't it?

A. Yes.

Q3. And it was also being written and circulated even after Steve got here?

A. Yes.

Q4. Now, do you know whether or not stapling and putting together of things that you say you saw happening at Stacy's, do you know whether it was that publication, or whether it was the Miner's Voice?

A. The one that was being stapled together at Stacy's place was the Miner's Voice.

Q5. Is that the Miner's Voice?

A. No, sir.

(Witness excused.)

[fol. 401] Mr. Dan Jack Combs: The Defendant announces through in chief.

The Court: Does the Commonwealth have any rebuttal?

Mr. Tolbert Combs: Yes, your Honor.

The Court: All right, call the first witness in rebuttal then.

---

The witness, SAM L. LUTTRELL, having been recalled by the Commonwealth in Rebuttal, and having been previously sworn, and having been reminded of his oath, further testified on,

Redirect examination.

By Mr. Tolbert Combs:

Q1. Are you the same Mr. Luttrell that testified here this morning?

Mr. Dan Jack Combs: I want to object, your Honor. This witness has remained in the court room, and the Commonwealth requested the rule, and he remained in here after he testified in chief. I don't think under the rule he is permitted to come back and testify in rebuttal after hearing testimony in open court.

Mr. Tolbert Combs: I think that is within the discretion of the Court, Mr. Combs, and Mr. Luttrell is an officer, and

ordinarily an officer is allowed to remain in the court room during the testimony.

[fol. 402] The Court: I think I made it very clear that anybody that remained in the court room wouldn't be permitted to testify.

Mr. Tolbert Combs: I don't recall him being in the court room when the particular question that I want to ask him about in rebuttal was discussed.

The Court: Well, I'll let him answer. Go ahead.

Mr. Dan Jack Combs: Except.

A. Yes.

Q2. Mr. Luttrell, prior to the publication of this pamphlet, did you—

Mr. Dan Jack Combs: Object to the conclusion. The question of publication is one for the jury.

Q3. Did you tell Ira Kilburn that he would be killed if he didn't make a move?

A. No, I didn't say nothing.

Mr. Tolbert Combs: That's all.

Mr. Dan Jack Combs: Nothing further.

[fol. 403] Mr. Dan Jack Combs: No, just a minute. Let me ask you a question, Bud.

Recross examination.

By Mr. Dan Jack Combs:

Q1. What did you tell Ira about him getting killed?

Mr. Tolbert Combs: Object. This is in rebuttal.

The Court: I'll let him answer.

(To which ruling of the Court Counsel for the Commonwealth excepts.)

A. He made certain accusations against people, and claimed that he was going to put it down on paper. He came to me and told me he was in dire fear of his life—

Q2. My question, Bud, was what did you tell Ira about him being in danger?

The Court: Did you tell him anything about it?

A. I discussed some of the accusations that he was making with some of the people that he was making them against.

The Court: Did you tell him that his life would be in danger, or anything in substance to that?

A. I told him it might be.

Mr. Dan Jack Combs: Nothing further.

(Witness excused.)

[fol. 404] Mr. Tolbert Combs: That's all we have, your Honor.

---

(Reporter's note: The following discussion took place in chambers and out of the presence and hearing of the jury.)

#### COLLOQUY BETWEEN COURT AND COUNSEL RE INSTRUCTIONS

The Court: I have the instructions given before. If there's any serious objection to them I will consider it.

Mr. Dan Jack Combs: Yes, we objected to the instructions then, and I do now. I don't think they are proper. I would like to request the Court to instruct, in addition to the formal instructions, that the duty was on the Commonwealth to prove beyond a reasonable doubt the falsity of the alleged libelous statements—unless they believe beyond a reasonable doubt that the statements were false, that they should find for the defendant.

I request further that the jury should be instructed with regards to the question of malice; that unless they believe from the evidence that the defendant maliciously did this, and unless they so believe beyond a reasonable doubt, they should find him not guilty.

And I request an instruction, or definition, as to publication, and an instruction on publication, and that if the jury believe beyond a reasonable doubt that the defendant did, in fact, publish this paper that they should return a verdict of not guilty.

I think criminal libel should be defined.

[fol. 405] Thereupon, the Court instructed the jury as follows: "Ladies & Gentlemen of the Jury, The Court instructs you:

### No. 1.

If the jury believe from the evidence to the exclusion of a reasonable doubt that the accused, Steve Ashton, did unlawfully publish in a pamphlet called "Notes on a Mountain Strike" of and concerning Sam L. Luttrell, Chief of Police of Hazard, Kentucky, Charles E. Combs, Sheriff of Perry County, and Mrs. W. P. Nolan, co-owner of the Hazard Herald newspaper, certain libelous and defamatory matter, the following libelous and defamatory matter concerning Sam L. Luttrell:

"Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. Its against the law for a peace officer to take private jobs.'"

The following libelous and defamatory matter concerning Charles E. Combs:

"The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined \$5,000 for intentionally blinding a boy with

tear-gas and beating him while he was locked in a jail [fol. 406] cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gunpoint.’”

The following libelous and defamatory matter concerning Mrs. W. P. Nolan:

“The town newspaper, the Hazard Herald, has hollered that “‘the commies have come to the mountains of Kentucky’” and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still.’”

wherein the said Sam L. Luttrell, Charles E. Combs and [fol. 407] Mrs. W. P. Nolan were presented to the public as a felon, a violator of the law, and as being degraded and unworthy persons, and officials as it applies to Sam L. Luttrell and Charles E. Combs, and was held up to ridicule and contempt, and that these words in said articles

"Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. Its against the law for a peace officer to take private jobs'"

"The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent court decision he was fine \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. [fol. 408] They escort the scabs into the mines and hold the pickets at gunpoint.'"

"The town newspaper, the Hazard Herald, has hollered "that the commies have come to the mountains of Kentucky'" and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give

the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still' "

and the legitimate inferences to be drawn from the language used by the defendant in the same is false and libelous, and was so known to be false and libelous when published by the defendant, and was written and published by him solely and for the purpose of bringing the said Sam L. Luttrell, Charles E. Combs and Mrs. W. P. Nolan into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation of the said Sam L. Luttrell, Charles E. Combs and Mrs. W. P. Nolan, as citizens and men and woman, and to render them odious to the good people of this State, then the jury will find the defendant guilty and fix his punishment at a fine in a sum not to exceed \$5,000.00 or imprisonment in the county jail for not more than 12 months, or both such fine and imprisonment, in the discretion of the jury.

[fol. 409]

2.

If the jury believe the statements of the publication to be true they must find the defendant not guilty, and that the law presumes the innocence of the accused and it is the duty of the jury if they could reasonably do so, to reconcile all the facts and circumstances of the case with this presumption, and if they entertain a reasonable doubt of the guilt or any material fact necessary to constitute his guilt, you will find him not guilty.

3.

The Court further instructs the jury that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable.

## 4.

Malice is an essential element of this offense, and it was the duty of the Commonwealth to prove beyond a reasonable doubt that the defendant maliciously published the "notes on a Mountain Strike" and unless they so believe they are to find the defendant not guilty.

## 5.

The Court further instructs the jury that it was the duty of the Commonwealth to prove beyond a reasonable doubt the falsity of the alleged libelous statements and that unless they so believe, they are to find the defendant not guilty.

## 6.

That the publication is an essential element of this offense and that this publication must be to a third party and that a publication to the prosecuting witnesses along does not constitute publication, and unless the jury believe beyond a reasonable doubt that the defendant published the alleged libelous matter to a third party they are to find for the defendant.

[fol. 410]

## 7.

If you, the Jury, have a reasonable doubt of the defendant being proved guilty, you should find him not guilty."

---

I, Peggy H. Mayo, Official Stenographic Reporter of the Perry Circuit Court, do certify that the foregoing testimony was heard upon the trial of the within styled case in the Perry Circuit Court at the time mentioned in the caption; that the witnesses were duly sworn before testifying and that same was taken down by me in shorthand notes and later, at the request of Counsel for Defendant, was transcribed by me upon the typewriter; that the foregoing transcript is a full and accurate copy of all the evidence introduced and heard, and offered to be introduced and rejected, and all exceptions, objections and avowals

concerning same; that the appearances are noted in the caption.

Given under my hand, this January 8th, 1964.

-----  
Official Reporter  
Perry Circuit Court

Examined and Approved.

This the 15 day of January, 1964.

Don A. Ward, Judge, Perry Circuit Court.

Filed, Mar 16 1964, Drexell R. Davis, Clerk, Court  
of Appeals.

[fol. 410A]

COMMONWEALTH'S EXHIBIT 1

Hazard, Kentucky  
Perry County  
March 22, 1963

### NOTES ON A MOUNTAIN STRIKE

I have been in these mountains of Kentucky for a few weeks now, looking at what it means to fight for the freedom from hunger. Southeastern Kentucky is essentially a "one product" area—it has only one commodity to sell here—labor. And the market for man's labor here is limited to one industry—coal mining. Things have been better here in the past, but now the median income in the 32 county area is \$25.00 a week and of Perry County's 36,000 residents 14,000 receive surplus food.

Coal was discovered in this "country" (the mountains) at the beginning of this century and the land was bought by outsiders for less than 50¢ an acre. Since then they have made millions—and mine experts say that not 1/10th of the "black gold" has been taken from these hills. And each year more coal is being mined here than in the years be-

fore. In 1962, 422 million tons were mined: this year they expect to mine 429 million tons. The price of coal per ton has not dropped significantly in years. Yet the mine operators claim that they can't afford to pay the contracted union (United Mine Workers of America) price, which is \$24.25 a day, plus a 40¢ a-ton royalty which goes into the United Mine Workers Welfare and Retirement Fund. It is that fund which supports the hospitals of this area—the same hospitals which the miners built for themselves in 1956.

In August 1962 the UMW Welfare Fund announced that it would shut down the 4 hospitals in this area by June 1963. Their claim was that the mine operators were not living up to their contract which called for the 40¢ royalty. The operators stopped paying the 40¢ some time ago, but the UMW stood by and watched until last year when they penalized the miners for the negligence of the mine operators. They withdrew the miners' welfare cards from the hospitals if their bosses failed to pay the price. So the miners lost the most important possession they have ever known—health security. There are still a few mines in Eastern Kentucky which do pay the royalty and the men who work the Union mines are entitled to hospitalization—until June when the hospitals close. Countless disabled people who live in them regularly shall either be moved hundreds of miles away or shall be without care. It was that action of last summer which kicked off this, the longest strike of this territory. It piled itself upon a series of Union breaking schemes devised by the operators of the mines. A short history would be appropriate at this point:

As I mentioned, coal was first mined here in the first part of the century. Before long there were mines on every hill—towns and cities were built around them. The workers would go into the mines before daylight and come out after dark . . . their pay: \$2/day. In 1930 the Union started to move into Perry County (Hazard is its seat) and by the time it was in there was more than one war. Harlan County

was the last and hardest of those organized. (Leslie Co., next to Perry, is still not organized.) "They say in Harlan County there are not neutrals there—Which side are you on, boys, which side are you on?" . . . So says the song, [fol. 410B] and so it is with every southeastern Ky. county—especially now. Men fought and some died to put the Union in this country—and they won their fight (for the time being at least). This part of Ky. grew through the 30s and a man could earn a good wage and feed his kids while working 8 hrs a day in a safe mine. During the war years the industry grew and everyone worked. After the war things were still booming (in a quiet way)—the Union was stronger than ever—mines were big, employing several hundred men, running day and night. A man could make \$21/day and by 1949-50 Hazard's population was up to 9,000. Although the area was never really prosperous a miner could live well and send his kids through school.

Union busting started in the mid-50s when the big mines started to lease out their land to small "truck mine" operators who didn't have union contracts. He would pull the coal out of the "dog-holes" which are just very small mines in the side of the hills. The operator then trucks his coal up to the "tipple" of the big company. A tipple is a large loading and sorting piece of machinery which fills the "coal gon" (railway cars) and can cost hundreds of thousands of dollars to build. The operator sells "his" coal to the big company at the tipple for less than \$3.00/ton and the company turns around and sells it for more than \$8.00/ton. The company keeps leasing out more land to operators for "scab" (non-union) mines until it can fill all of its coal orders from the scab coal from the truck mines. Then it will serve notice on the Union that they shall close in 60 days and terminate the UMW contract. They then produce coal for 1/4 or 1/5 of the cost of Union labor. Whereas the contract price is \$24.25/day they then pay \$5, \$4, \$3, \$6, \$7, \$8 a day. And whereas the contract calls for a 40¢/ton royalty to the Welfare Fund they pay nothing.

In other words the operators cheat each miner out at least \$10. a day, and often \$20—plus cutting off his hospital security.

There are now hundreds of small truck mines running scabs for from \$2-\$8 a day which are making great profits. One large operator, Charlie Combs, also the High Sheriff of Perry County, has publicly bragged of making \$60,000 in sixty days. Others say that they have made more! New houses costing \$40,000 and up are being built all over this country by mine operators. They are buying new coal trucks for their scab operations. Some give their kids enough money to flash \$50 bills in school. At the same time the men he owns, his mine workers without whom he would starve, live in houses which cost \$100-\$300 to build and their kids don't go to school because they don't have the clothes nor the shoes. If they can get to school they are lucky, for there they can eat the only hot meal of the day—if someone will pay for it. I know one teacher who marched 40 kids into the cafeteria every morning and fed them so they could last the day through . . . and that would be all they would eat for the day, except for perhaps some flour gravy at night when they went home.

I was driving up a mountain road one morning when it was less than 20 degrees outdoors and I passed a school. The schools are generally modern and good. About a mile up the road I saw a boy walking through the cold damp fog carrying a lunchbox and wearing no coat, no sleeves. He was walking to school in only a short sleeve shirt. At the time I was on my way up to Whitesburg, where I was to [fol. 410C] meet some people who were to guide me to some miners' homes there, which they did. I saw families of 8 to 12 people . . . women 33, 35 years old with 9 and 10 kids. More than one little girl had to stay home from school due to lack of clothes. Ollie Mae Sturgill, age 14, ran off to school in the middle of Kentucky's worst winter in history *with no shoes*. Her mother was at the hospital that morning, but when she returned Ollie Mae was told

not to do that again—not until spring. The Sturgills live in one and a half rooms with a total dimension of about 16' x 16'. That's kitchen, bedroom and "living" room. The eight people in the Sturgill family have *one* bed. They also have an infant boy and a son 16 years old who has worked in the mines for 2 years! When Mr. Sturgill and his son work the family still doesn't have enough to pay all its bills, much less save a cent. Between them they earn \$25-\$35/week—sometimes less. They don't know from day to day whether or not there will be work at the mines. Their mine pays no union royalty so they are not eligible for hospitalization (which normally includes dental work, etc.) however some of the doctors will take care of them even though their Welfare Cards have been pulled. Their employer has failed to pay unemployment insurance so they are stuck—they can't afford to work for the price of a few dollars a day, and can't afford to quit. But they are fortunate—they can walk to their mine—many have to pay dollars a day for gas to get to their mines! Many men now work for the amount of coal they dig instead of by the day. They get so much a ton and that's that. If there is a break-down then they are in a spot—they can't load any coal, yet they have to work all day and get paid not a dime . . . but they might have had to pay \$2 or \$3. for gas to get there! They come out in the hole. There are hundreds and thousands here like the Sturgills who are so abused it sickens me.

The operators consider mules and ponies to be more valuable than men: if there is an accident and a mule is crushed and broken to death, the operator has to *buy* another—but if a man is buried and crushed to death, the operator merely *hires* another, losing nothing, caring not.

So it is in southeastern Kentucky—more tragic than can be said in words and a few pages. I have said nothing about men digging coal in water 2'-3' deep in a shaft which is not much bigger than that. Everytime a man digs in and gets a shovel of coal it all washes off as he brings it through

the water. That's rough when a man is getting paid by the amount of coal he digs! The Union contract says that miners will not work in water over 2" deep. Nothing has been said about blasting with fuse instead of electrical charges. Fuse blasting is against not only the Union contract, but the law as well. Nothing has been said of the death threats to any worker who tries to organize, of the astronomical evasions of income tax by the operators, of the intimidations at gun-point in the mines, of the many brutal beatings.

I saw the pay slips of men who worked the mines of the Walters boys, four brothers who own truck mines. *For nine months work the men received less than \$370.00!* That's less than \$11 a week! And with that a man has to feed and clothe a family . . . a mountain family is rarely less than 6 and is often 12 or more. I find it inconceivable that a man can live of such wages—isn't this an interesting phase of American culture!

[fol. 410D] But does it need be this way?

I stayed with a Union miner who never scabbed a day in his life. He retired a few years ago when the Union was working his mine. We ate three eggs for breakfast, complete with pork chops, buns and gravy. He drives the car he wants and has sent his kids through school. A Union mine is free from the miseries of those mentioned above. A Union man pays nothing for his hospital care and that of his family. He gets at least \$24.25 a day and never works in water. He is sure of his job and his retirement. He works in safe mines with electrically charged blasts instead of dangerous and illegal fuse.

Since the mid-50s the Union has been carved away and the whole economy has shown its toll. The population of Hazard has dropped to 6000—no new industry has moved in and some businesses have moved out.

Now the miners have had enough and are insisting on a living wage.

This strike started in September, 1962 and is now 7 months old. It started after the Welfare Cards were withdrawn. Although it is a "wildcat" strike which is not authorized by the UMWA and gets not aid from it, the pickets have grown continuously stronger. At times the pickets have lived only on the finances of the old retired miners who donated \$25/month from their \$75/month pensions. They faced the whole winter without any assistance to speak of—but had astronomical resistance. These men have been threatened and intimidated by operators and their gunthugs. There is a price of \$8,000 on the heads of the strike leaders, Berman Gibson and Charlie Moore. Operators (mostly the Walters Boys) are paying for their removal. The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent court decision he was fined \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gunpoint.

A few months ago as many as 17 State Police cars were lined up at the entrance of one mine. They broke up the picket lines until, as a last resort, the pickets were joined by several ministers who turned the line into revival meetings. They held church for 24 hours a day—and that was the only way the line could continue; the police will not bother the church. One of the Preachers, Rev. Garrett

White, tells of going up to scabs' cars to talk to them and [fol. 410E] seeing all kinds of artillery—pistols, high powered rifles, and, in one car, a machine gun!

Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: the Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. Its against the law for a peace officer to take private jobs.

Last month 4 pickets were shot while on the picket line at one mine, Blue Diamond #1. A black Ford speeded past the line and shot into it. Since then the pickets have armed themselves—nearly every one now carries a revolver of some sort—.38 police special, luger, Colt .45. Gibson, Moore and Stacy, three of the leaders, never leave the house without arms and another man. Considering the paid gun-thugs of the operators I suppose that is the only reason there is still a strike. And even with the arms there is the danger of dynamite.

I saw the dynamited home of a man who owns a supermarket which donated a few thousand \$ worth of food to the pickets. It was destroyed nearly beyond repair . . . the new \$12,000 house had \$8,000 damage done to it. I saw the remains of a picket leader's home which was blown up: every window was knocked out, the front porch was blasted clear off, and the roof was knocked loose. The man, his wife and child were asleep when the bomb was thrown from a moving car. A bit of irony was found in the child's room, where glass was strewn all over a table full of school books. Under pieces of glass and splinters was the battered book *The Story of American Freedom*. Added to these are automobile bombings and the threats of violence press continuously on the leaders.

The old union song is now a reality here—"Which side are you on, boys? . . ." Sides are being chosen for the showdown, which is on the way and not far off. The Sheriff, State Police, City Police have proven that they are either operators themselves (as is the High Sheriff) or in cahoots with them. The gun-thugs and operators are murderous and crooked men who have starved men to death, and their families with them, just so new cars could be bought for every member of the operator's families. The town newspaper, the *Hazard Herald*, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The *Herald* was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the *Hazard Herald*, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1,100 of the money has come to the pickets and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still.

[fol. 410F] Strike meetings have traditionally been held in the County Courthouse of each county. So it was for 6 months of this strike. On February 6 the Perry County Courthouse (Hazard) was closed to the strikers because "public buildings may not be used for meetings by organizations advocating sedition or subversive overthrow of the government."

Several times the FBI has been here intimidating and harassing the pickets (they were just here today in fact, asking about every person who has visited the pickets) while at the same time they refuse to investigate any of the illegal practices of the various police or the operators. Unheeded and remaining uninvestigated are the minimum wage requirements—child labor laws are constantly ignored and

mine safety laws are unenforced. Not even public threats of violence nor violence itself bring investigations of the operators. I have heard Gibson say at a strike meeting in the Letcher County Courthouse, "Oh God-a-mighty boys, this is the crookedest damned place in this country!" . . . and I have to agree with him from what I have seen in these weeks. Criticism does not stop with the local politicians: President Kennedy promised this area some help before his election and has yet to mention it again, much less do a thing about it! Gibson pointed out that "Kennedy has been giving aid to the Cuban refugees so they won't have to lift a finger to do any work, but would give not a cent to the starving American miners."

So it is—no one is giving a cent to the miners, save only some individuals and local labor unions in the north and west. The UMWA claims it cannot afford to support the strike due to their vulnerability to injunctions and suits, for which a wildcat strike is less liable. (However Gibson and over a hundred others have been served injunctions—see enclosed letter from Miners' Fund.) In the strike of 1959 the UMW claims to have spent \$30,000,000.00 (thirty million) and they can't afford that again. It is the opinion of most men here that John L. Lewis, UMW head, is in sympathy with the miners, but that they may not be able to support the strike. The UMW hospitals which are being closed are actually owned by the UMW Welfare and Retirement Fund, a separate institution from the actual Union.

On the other hand there are some men who believe that the UMW has deserted the area. There is evidence for both cases, but one thing is certain: that the UMW is not helping organize the truck mines and are not aiding the strike in any way. This is strictly a rank-and-file protest which is bound and determined to win, one way or another. They claim that they have eaten only food they've hunted or picked from the hills during the hard times of a strike, and they say they are ready to do it again. But this should not be necessary . . . and may not be.

Personal help has come from over 40 cities from coast to coast and has been increasing, but it must continue to grow if this strike is to be won and the children fed. Gibson [fol. 410G] states that it costs over \$1,700 a week to handle this strike even in the cheapest way—it should be more. The pickets get fed only by contributions sent from outside, and furthermore, all their electric bills and coal bills must be paid while they are on strike. It costs money to win a strike, and it is our responsibility to help them, for if the operators here are permitted to keep a man down and hungry, then companies will keep men down and hungry elsewhere. This is, in my opinion, the most important labor protest in recent years.

For more details, especially regarding the recent floods (in which I was caught in the mountains for a day and night and had to climb 10 miles over the mountain to get back to Hazard) see the enclosed letter from the Miners' Relief Fund.

###

###

Note: Since I started to write and type these notes I have discovered the following:

That a man working in a truck mine, who was getting paid only a few dollars a day, was caught in a rock fall. By the time they pulled him out from under the rocks he was dead. One of the men who carried him to the fresh air also carried his lunch box, which was also smashed slightly in the crash and opened up when the man dropped it outside. In it was found the dead miner's lunch—potatoe peals. Potatoe peals for lunch.

In another mine another man was seen entering and leaving the mine in the dead of winter, wearing coffee sacks for shoes . . . coffee sacks tied around his feet to walk through the sr w.

This morning someone took me to the hospital where I met a man with crushed hips and a compounded fractured

leg. He was crushed in a rock fall last December. He has been disabled since then. He worked a mine which had a wet crumbly slate roof. The top should have been reinforced with cross-bars and safety props should have been used for support . . . according to law. These were all lacking. A union mine would not even let the man work in a mine without proper safety precautions. If the mining laws were obeyed that accident would have never occurred. But the real tragedy is that man's situation now. He has absolutely no income—the mining company had no insurance on him, and has paid (still doesn't) no unemployment. Consequently he is responsible for his family of seven people and cannot earn a cent. He shall be in a cast for the next two months and shall not walk for at least a year the doctors tell him. He can't even collect Social Security because his employers have not been paying it. Although he has been disabled for the last 4 months, he just received his first month of food stamps (\$60.00/month). When I asked what he and his wife (with kids ranging from 8 to 1½ years old) would do for money from now on. How will he pay his rent? Electricity? Keep his kids in school? What will he do for money? . . . "I'll have to do without" was his reply. He is left with the hospital bills and doctor bills to pay as well and gets no help from anyone. It can happen to any one of thousands of miners here . . . it might happen to all if something isn't done.

###

###

[fol. 410H] I would like to know your reactions to all of this if you could take a few minutes to communicate your feelings to me. I shall try to answer any questions and send any more information if you need it. If you decide to do anything which may be of any help, please let me know.

I shall spend the rest of this semester doing private study with a teacher whom I know at Tougaloo College in Mississippi. I may write another piece such as this from there. I was there for 10 days last semester as an exchange stu-

dent from Oberlin and found it necessary to return for a longer stay.

Expecting to hear from you soon,

yours,

/s/ STEVE ASHTON

Write:

Steve Ashton  
c/o Salter  
Tougaloo College  
Tougaloo, Mississippi

Dear Mr. Bridges,

Although this material was sent primarily to my personal friends, I intended to contact you with a letter, but this should explain the situation as well. As you can see, these boys need help. Last night several men who owe payments on their furniture and mortgages had to be told they could not be helped until help came in from the outside. The strike shall go on, but men may lose their homes. Can you help? Please let me know if you can.

Yours,

/s/ STEVE ASHTON

[fol. 410I]

Hazard, Ky.

Dear Friend and Brother,

We thank you for your much needed contribution or concern. As you know, it takes a great and steady flow of funds to finance a struggles such as the one in which we are engaged. One problem piles itself upon another and makes us even more determined to beat the mounting obstacles. Within the last few weeks we were served with several injunctions—some of which are on men who have never

beer in the area from where the injunctions have been ordered! These injunctions are totally unjustified and illegal, but it takes money to fight them. The strike leaders have two hearings on the same day in places 175 miles apart! Even if they could be in two places at once, it would take costly lawyers' fees to fight them, plus the costs of food and transportation of approximately 125 men. And that is just the reason we have been served these injunctions—to pressure us and to break us. But they shall not break us—not as long as we have help from you, our brothers in this struggle. Everytime we have a hearing it costs about \$1,000. and this money must come from outside help, for, as you well know, the UMW of A does not help us in any way. We'll win this long battle (its in its 7th month) even if we all have to sell everything we own!

Outside help has been increasing, due to some national press coverage, but our obstacles have steadily increased as well, leaving us in the hole. We miners have to fight the operators, their gun-thugs, the courts, the National Labor Relations Board and nearly every form of police in this country—not to mention the “public” officials (governor, etc.) and, now even ol' mother nature!

Within less than a week there were two floods which rose 36' and 24'. The river is generally 9'! In those floods there was more damage done to this country than ever before. Houses (shacks really) were washed away by the dozens—those which weren't washed away were destroyed by mud dozens of inches thick. Tons of food were ruined and furniture washed under the bridges of the Kentucky River. Several cases of food poisoning have been reported by people who have been starved into eating food contaminated by the waters. The dangers of epidemics press on every family. Of course, not all the homes were ruined or even hurt. Those on high ground were relatively free from trouble. But it takes a rich man to own a brick house on high ground. It is the poor man who gets hit the hardest—

if not by the flood waters, then by the landslides which went with them . . .

[fol. 410J] Houses were pushed off the hills by trees, rocks and dirt. This too is caused by the operators! They strip off the foliage and push the augered dirt over the hill in order to run their strip mines. They never replace the trees or bushes which they destroy. When it rains as little as a  $\frac{1}{2}$  inch the hills slide into the creeks—then the water has no place to go, but to back up into the houses nearby. Perhaps it was wrong to say that we have to fight mother nature—if it weren't for the thoughtless operators we wouldn't have the floods we do today. In order to solve the water problem completely, though, we need some dams up in this country.

What we're trying to say is this: we need more help now than ever before; we need food, we need clothes, we need money, and we need legal advice.

We shall try to keep you informed of our progress if you send us your address. The *Miners' Voice* is printed fairly regularly and with a small contribution you can get copies of it sent to you or your group.

Thank you brothers, and remember,  
our fight is your fight.

Sincerely for freedom,  
the Roving Picketts of Southeastern  
Kentucky.

.....

Miners' strikes have been known to last two years. It looks as if we may face another 6 months or a year of this and we are ready to make the sacrifices. We can always take to the hills in the spring and summer and hunt and eat "poke". We've lived on greens before and we can do it now if necessary. But we need money for clothes even if we do eat poke. A monthly pledge of contributions will help us to win our fight.

---

I PLEDGE \$..... A MONTH TO HELP WIN  
THE STRUGGLES OF LABOR AS FOUGHT  
BY THE KENTUCKY MINERS.

- ☐ Please send me the MINER'S VOICE for my  
monthly contribution of \$1.00 for printing and  
mailing.

NAME .....

ADDRESS .....

CITY .....

send to: MINERS' RELIEF FUND  
Berman Gibson, Chairman  
321 Broadway, Hazard, Kentucky  
Phone: 436-3603



# THE MINER'S VOICE

## HAZARD'S GOOD CITIZENS

Well people, we have seen this term of The Court open. We have seen the jury sworn in, and we hope that Mr. Morton of the Good Citizens' Committee, Mrs. Nolan of The Hazard Herald, and everyone that is connected with WKIC Radio Station are well pleased. You heard Judge Wells instruct the Grand Jury on how to clean up this bunch of cut-throats in Perry County. Now if you people are any kind of citizens at all, you will get behind the best Judge that this county has ever seen. You good citizens have got a chance to prove whether or not you are interested in the welfare of this county. What can you do? You can get out and get the Grand Jury evidence on who blew up that church on Dwarf Mountain, prove who blew up Mr. Ritchie's home on Clear Creek, who blew up Mr. Smith's home on Big Creek, who blew up Mr. Buchanan's office building in Bulan, and also let's prove who blew up Henry Womble's garage and cars in Hazard. We have been hearing a lot of talk about the Good Citizens of Perry County. How do you qualify yourselves as good citizens? I have always considered myself a good citizen. I was born in 1919 in Perry County, and have lived here forty-three years. I have worked

twenty-two years in these mines. I served four years with the Army Air Force. During World War II I flew forty-two combat missions and was awarded the Air Medal with a Silver on Four Gold Leaf Clusters and a half dozen or more Battle Stars. I was shot down by enemy fighters and spent nine months in a prison camp, I made the Hazard Herald several times and the Courier Journal. Well, I was a good citizen then. What have I done to keep me from being a good citizen now? Who am I? Well, I am a PICKET.

We miners of Southeastern Kentucky have come to realize that something must be done about the hardship and poverty in these coal mines of this county. Approximately five months ago a revival was started by the Old Retired Miners, for the soul purpose of bringing the UMWA back to the mining pits of Eastern Kentucky, in full force. These old pensioners reached down into their pockets for money to finance this movement and continued to do so until we started receiving help from other sources. We are going to continue picketing until we see the UMWA return to these coal mines.

---THE ROVING PICKETS OF SOUTH-  
EASTERN KENTUCKY  
March 7, 1963

STEVE ASHTON  
400 WALKER RD  
HAZARD, KY.

Mr. Harry Badges

c/o The Dispatcher

130 Golden Gate Ave

SAN FRANCISCO, CALIF.

IMPORTANT:  
PLEASE FORWARD

[fol. 412]

## IN THE COURT OF APPEALS OF KENTUCKY

---

STEVE ASHTON, Appellant,

v.

COMMONWEALTH OF KENTUCKY, Appellee.

---

APPEAL FROM PERRY CIRCUIT COURT

HON. COURTNEY C. WELLS, Judge.

---

OPINION AND ORDER—Rendered June 18, 1965

## OPINION OF THE COURT BY COMMISSIONER CLAY AFFIRMING

Appellant was convicted of the *common law crime of criminal libel* and his punishment fixed at six months in jail and a \$3,000 fine. The principal ground urged for reversal is that the nature of the offense was so "vague" and "inclusive" that appellant's conviction violated his constitutional rights of freedom of speech and due process.<sup>1</sup> This raises a novel and serious question which we will dispose of first.

The charge in the indictment is as follows:

"On or about the 22nd day of March, 1963, in Perry County, Kentucky, the above named defendant committed the offense of criminal libel, by publishing a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs, [fol. 413] Mr. and Mrs. W. P. Nolan, against the peace and dignity of the Commonwealth of Kentucky."

---

<sup>1</sup> Under the first and fourteenth amendments to the United States Constitution.

Sam Luttrell was the chief of police of Hazard, Kentucky; Charles Combs was the sheriff; Mr. and Mrs. Nolan edited a local newspaper. The alleged defamatory matter appeared in a printed pamphlet entitled "Notes on a Mountain Strike", which was written by the defendant. He was a college student from Ohio who had come to Hazard to help unemployed miners in that area. This was a time of serious unrest in Perry County.

Although defendant raises some question about it, there is no doubt that the evidence proved "publication" of this pamphlet. The proof further establishes, and defendant admits, that certain statements therein, referring to the chief of police and the sheriff, were defamatory *per se* and were false. Though defendant contends the statements made about Mrs. Nolan (Mr. Nolan is not involved) were true, there was sufficient evidence that the statements accusing her of a breach of trust in the distribution of certain funds were in essence false.

By instructions to the jury the trial court made a most commendable effort to identify the crime more fully than was done in the indictment. To convict, the jury was required to find the defendant "did unlawfully publish \* \* \* certain libelous and defamatory matter" which was "false and libelous, and was so known to be false and libelous when published by the defendant, and was written and published by him solely and for the purpose of bringing (the complaining witnesses) into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation (of the complaining witnesses) \* \* \*."

The court further instructed "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable"; and that "malice" was [fol. 414] "an essential element of the offense". The jury was also advised that truth of the statements was a complete defense. These instructions were in fact so comprehensive in detailing different aspects of the crime (although omitting

a definition of "malice") as to be somewhat confusing. However, defendant claims no specific error in the instructions.

The basic contention is that the case law of Kentucky does not adequately define the crime, and the trial court's attempt to delineate its elements was so vague, multifarious, and indefinite, and so inclusive of innocent acts, that the law lacks certainty with respect to the conduct condemned. Therefore, it is argued the conviction of the defendant deprived him of both the right of free speech and due process of law.

We will assume, although as far as we can discover after exhaustive research no case has decided this particular point, that the same certainty required of a criminal statute applies to a *common law crime*. See *Sullivan v. Brawner*, 237 Ky. 730, 36 SW 2d 364; *Roberts v. United States*, 226 F. 2d 464; *Winters v. New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840; *American Communications Association, CIO v. Douds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 1391.

It is true that the offense of criminal libel has been subjected to stress and strain through its long period of development since the existence of the Court of the Star Chamber in England around the year 1600.<sup>2</sup> A distinction was then recognized between defamation of a private person and a public official (which has continued to this day). With respect to the former, the real offense was the tendency of defamatory words *to incite a breach of the peace*. Where a public official was involved, criminality consisted [fol. 415] of the *scandalous attack upon the government*. This latter was *sedition* libel, a political offense,<sup>3</sup> and most

<sup>2</sup> The historical background hereafter given was taken principally from an article entitled *Constitutionality of the Law of Criminal Libel*, 52 *Columbia Law Review* 521 (1952), and an article, *Seditious Libel; Myth and Reality*, by Ervin Brandt, 39 *New York University Law Review* 1 (1964). Other texts examined have been *Odgers on Libel and Slander* (6th Ed.), and *Newell, Slander and Libel* (4th Ed.).

<sup>3</sup> See Plucknett, *A Concise History of the Common Law* (5th Ed.) page 489.

prosecutions for criminal libel in the United States seem to reflect shadows of this long since discredited ground of criminality.

It has been roundly questioned whether there ever was actually a *common law* crime of seditious criminal libel in England,<sup>4</sup> or if so, whether it survived the first amendment to the federal constitution.<sup>5</sup> In any event, it is certain that the English crime, as such, was not imported into the United States. This conclusion is inescapable when we consider the elements of the English crime, which constitutions, statutes and court decisions have substantially modified. One could be guilty of criminal libel under the English law without a showing of (1) malice, (2) falsity, or (3) publication, and (4) without a jury's finding the published matter was libelous. That was the status of the so-called common law criminal libel of England when written constitutions were adopted in the United States. It was against this background that the right of freedom of speech was recognized.

The first amendment to the Constitution of the United States provides that: "Congress shall make no law \* \* \* abridging the freedom of speech, or of the press; \* \* \*."

Section 1 (subsection four) of the Kentucky Constitution recognizes as an inalienable right of all men: "The right of freely communicating their thoughts and opinions."

Section 8, Kentucky Constitution, provides in part: "Every person may freely and fully speak, write and print [fol. 416] on any subject, being responsible for the abuse of that liberty."

Section 9, Kentucky Constitution, provides: "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where

<sup>4</sup> Seditious Libel; Myth and Reality, by Ervin Brandt, 39 New York University Law Review 1 (1964).

<sup>5</sup> Mr. Justice Holmes, dissenting, in *Abrams v. United States*, 250 U. S. 616, 630; concurring opinions of Justices Douglas, Black and Goldberg in *Garrison v. Louisiana*, — U. S. —; 85 S. Ct. 209, 13 L. Ed. 2d 125; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963).

the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."<sup>6</sup>

The above passages clearly show that both federal and state governments were attempting in some manner to escape the abuses of criminal libel prosecutions in England when they were written into American constitutional law. Also, with adoption of these provisions, emphasis shifted from the protection of political institutions to the protection of the individual's right of free expression. As an original proposition it would have been neither difficult nor unreasonable for the courts of this country thereafter to conclude that the common law crime of criminal libel had not survived our federal and state constitutions. There is respectable authority for that view even today.<sup>7</sup>

However, the fact remains that the crime of criminal libel is recognized and enforced throughout the United States. While many states have made the offense a statutory crime, the courts of those states which have not legislated on the subject have acknowledged the existence of the crime in its common law form.<sup>8</sup> In the only two cases we have found where the question was squarely presented as to whether the common law crime survived in the

---

<sup>6</sup> This section of the Kentucky Constitution incorporated the two important provisions of Section 3 of the Federal Sedition Act of 1798, 1 U. S. Stat. 596, 597, which stemmed from the English Fox Libel Act of 1792, 32 Geo. 3, Ch. 60. The provision with respect to jury function did not effect any change in the mode of jury trial. *Walston v. Commonwealth*, 32 KLR 535, 106 SW 224.

<sup>7</sup> See the concurring opinions of Mr. Justice Douglas, Black and Goldberg in *Garrison v. Louisiana*, — U. S. —, 85 S. Ct. 209, 13 L. Ed. 2d 125; *Irvin Brandt, Seditious Libel; Myth and Reality*, 30 New York University Law Review 1; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924.

<sup>8</sup> *Beauharnais v. Illinois*, 343 U. S. 250, 265, 72 S. Ct. 725, 96 L. Ed. 919.

United States, the answer, after careful consideration, was in the affirmative. *Commonwealth v. Whitmarsh* (Mass. 1836), *Thacher's Criminal Cases* (page 441), and *Commonwealth v. Chapman*, 13 Mass. (13 Metcalf) 68 (1847).

In Kentucky, as heretofore noted, section 9 of the Constitution refers to "indictments for libel". Section 132 of the Criminal Code dealt with such indictments. In at least six Kentucky cases this Court has recognized the common law crime. *Tracy v. Commonwealth*, 87 Ky. 578, 9 SW 822 (1888); *Smith v. Commonwealth*, 98 Ky. 437, 17 KLR 1010, 33 SW 419 (1895); *Browning v. Commonwealth*, 116 Ky. 282, 76 SW 19 (1903); *Commonwealth v. Duncan*, 127 Ky. 47, 104 SW 997 (1907); *Yancey v. Commonwealth*, 135 Ky. 207, 122 SW 123 (1909); *Cole v. Commonwealth*, 222 Ky. 350, 300 SW 907 (1927). It is significant that in none of those cases did the defendants question the nature of the crime or the certainty of the elements of which it consisted. While the same questions were not involved in each case, and while in none of them do we find a comprehensive definition of criminal libel, they jointly recognize its four basic elements: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice.

Some of these cases made reference to another aspect of the crime which defendant contends contributed to the vagueness and uncertainty of the law. This was the tendency of the defamatory words to lead to a "breach of the peace". In the *Tracy* case it was said "the publication is, in effect a breach of the peace". In the *Duncan* case it was said that the publication "was manifestly calculated to create a disturbance of the public peace". In the *Browning* case it was said "the publication amounts [fol. 418] to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society". In the *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84, 72 SW 754 (1903), a civil suit for malicious prosecution for criminal libel, the court said "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable".

It is defendant's contention that to define the crime in terms of its tendency to cause a "breach of the peace" or lead to an indictable act is too indefinite to identify criminal conduct. There are two answers to this argument.

In the first place, the quoted statements from our cases simply refer to the *nature of the writing* which would constitute the basis of the charge of criminal libel. In those cases it was assumed that words which were defamatory per se were sufficiently offensive to be criminally libelous, provided the other elements of the crime were established. In those cases, as in the one before us, there was no issue concerning the defamatory nature of the published matter. Consequently the possible uncertainty of the concepts of "breach of the peace" or "indictable offense", as descriptive of the nature of defamatory matter, does not unstabilize the essential elements of the offense with which defendant was charged.

In the second place, in the development of the common law of criminal libel in the United States the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a "breach of the peace" or to induce others to commit a public offense.

It has been observed:

"Whatever validity the former ground—keeping the peace—had historically was 'rejected with finality (over) fifty years ago.' Originally, criminal libel laws emphasized the state's concern with the prevention of sedition and turbulence. Even later expansion to ordinary or nonpolitical defamation [fol. 419] could be explained as an effort to provide a substitute for the self-help remedy of the duel. After the passing of the custom of dueling, the common-law development could no longer be justified in terms of the interest in preservation of peace. Once truth was recognized as a complete defense, at least in the civil action, it was perfectly clear that the interest being served was no longer keeping of the peace."<sup>9</sup>

<sup>9</sup> Libel and the First Amendment—A New Constitutional Privilege, by Arthur L. Berney, 51 Virginia Law Review 1, 40 (1965).

The erosion of the "breach of the peace" justification for criminal libel laws was recognized in *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 2d 125. See also Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale Law Journal* 877, 924 (1963).

In fact the ancient broad common law concept of what constituted a "breach of the peace" is no longer a constitutional basis for imposing criminal liability. *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. See also *Edwards v. South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 697; *Henry v. City of Rock Hill*, 376 U. S. 776, 84 S. Ct. 1042, 12 L. Ed. 2d 79; *Cox v. Louisiana*, ..... U. S. ...., 85 S. Ct. 453, 13 L. Ed. 471; *Constitutionality of the Law of Criminal Libel*, 52 *Columbia Law Review* 521, 528 (1952).

None of our Kentucky cases based the criminality of the act upon the tendency to cause a "breach of the peace" or the commission of an "indictable offense". To the extent they defined the defamatory nature of the words in these terms, they are obsolete. In our latest case on the subject, *Cole v. Commonwealth*, 222 Ky. 350, 300 S. W. 907 (1927), which perhaps came closer to defining the crime than any of our other opinions, no mention is made of the possibility [fol. 420] of public disturbance which might be incited by the publication.

We conclude, therefore, that defendant cannot fairly claim that an outmoded aspect of the impact of the defamatory words made uncertain the kind of conduct for which he was prosecuted and convicted.

As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice. There is no uncertainty in the law about what constitutes (1) publication, (2) defamatory words, or (3) falsity. There is a certain indefiniteness concerning the nature of malice but we find this difficulty with that term throughout the criminal law.<sup>10</sup>

<sup>10</sup> *Mens Rea*, 45 *Harvard Law Review* 974.

In *Riley v. Lee*, 86 Ky. 603, 11 ALR 586, malice was defined as the intentional publication of defamatory matter "without justifiable cause". This was a civil suit but it is a broad description of the mental state which constitutes actual malice in criminal libel. Wharton's Criminal Law and Procedure (Anderson's Edition), Vol. 2, section 879 (page 745); 33 Am. Jur., Libel and Slander, section 312 (page 249). The last cited authorities used the words "without legal (or lawful) justification or excuse". The definition in these terms is not very helpful because it leads us into a vast field of what constitutes justification or excuse.

A more workable analysis appears in *Smith v. Commonwealth*, 98 Ky. 437, 33 SW 419 (1895). That case involved the question of whether the jury should be instructed to find "malice". The Court held an instruction proper without use of this term when the jury was required to find that the publication was false and libelous and was "written and published by (defendant) solely and *for the purpose* of bringing the (prosecuting witness) into great contempt, scandal, infamy and disgrace". (Our emphasis.)

[fol. 421] The United States Supreme Court has recently added an additional measure of malice in a criminal libel case where the defamatory words concern public officers and public affairs (which we have in the present case). In *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 2d 125, it was held that the state could not impose criminal sanctions for criticism of official conduct of public officials, even though false, unless the defamatory words were published "with knowledge of their falsity or in reckless disregard of whether they are true or false". This added another dimension to malice, although serious questions arise concerning its practical utility and proper application.<sup>11</sup> There is still an area of inevitable uncertainty in pinpointing the evil intent within the scope of the term.

<sup>11</sup> *New York Times Co. v. Sullivan*—The Scope of a Privilege, 51 Virginia Law Review 106.

We may point out that defendant does not contend the element of "malice" is so vague, or uncertain, or inclusive as to make unconstitutional his prosecution or conviction for criminal libel. We have discussed this matter because it has given us some concern and because it is significant on the next contention made by defendant.

It is argued there was no *evidence* offered to show that defendant's defamatory statements were made with "actual malice". That is what *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 95 ALR 2d 1412, 11 L. Ed. 2d 686, and *Garrison v. Louisiana*, U. S. , 85 S. Ct. 209, 13 L. Ed. 125, apparently require. However, neither of those cases required *independent* proof of malice. Obviously, unless the defendant had told someone of an evil motive or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual [fol. 422] malice (i.e., a calculated falsehood), by proof rather than presumption, but they lay down no constitutional standards with respect to the *sufficiency* of proof (although *New York Times* considered the question of sufficiency).

As we have intimated, if the defendant has not stated his motives to another person or has not taken the stand as a witness (as here), it is a practical impossibility to prove his knowledge, or reckless disregard of the truth, or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct. Malice may be proved by circumstantial evidence as any other fact. *Combs v. Commonwealth, Ky.*, 356 SW 2d 761.

In the present case the defendant was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false.

This was a period of strife between union and non-union miners, and the defendant and the prosecuting witnesses were in opposing camps. From all these facts a jury, not necessarily but reasonably, could conclude that the defendant was motivated by actual malice: that is, he knowingly or in reckless disregard of the truth published these false statements for the purpose of exposing the prosecuting witnesses to public degradation.

It may be noted that the trial judge by his instructions required the jury to find malice in substantially these terms. Actually the instructions were more favorable to the defendant than the law required. The jury was required to find the defamatory matter was "known to be false", even though a reckless disregard of the truth would have carried the same imputation of wrongful conduct. The jury was also required to find that the defamatory matter was published "*solely* and for the purpose of" bringing the complaining witnesses into public degradation. This language was taken from *Smith v. Commonwealth*, 98 Ky. 437, 33 [fol. 23] SW 419 (1895). It is not only ungrammatical but would seem to excuse the defendant if he could show some collateral purpose influencing his conduct. While we disapprove of the use of the word "*solely*" in the instruction, its inclusion favored the defendant. On this point we must conclude that the evidence, even though circumstantial, was sufficient to support a jury finding of actual malice.

It is next contended the indictment was fatally defective in that it did not set forth facts sufficient to constitute a criminal offense. The indictment is quoted at the beginning of this opinion. From our discussion of other problems arising in this case, it is apparent this indictment in substance sets forth all of the essential elements of criminal libel. It certainly conforms with the requirements of RCr 6.10(2).

Under RCr 6.22 defendant moved for a bill of particulars, which motion was denied. This was error. At least defendant was entitled to an accurate copy of the alleged libelous matter. Prior to the adoption of our new criminal

rules, apparently this would have been an essential part of the indictment. Roberson's New Kentucky Criminal Law and Procedure, 2d Ed., section 1186 (page 1404). However, the denial of this motion was not prejudicial. There is no suggestion defendant was not fully aware that he was being prosecuted for the libelous matter, concerning the specifically named prosecuting witnesses, which appeared in "Notes on a Mountain Strike", or that he did not have a copy of this printed material. Defendant insists he was entitled to know "in what manner it was claimed publication was made" but this is quibbling over a relatively unimportant matter. We cannot find the denial of defendant's motion in any way prejudiced his defense.

The final contention is that the verdict was concurred in by only 10 members of the jury and was void because in violation of RCr 9.82 and RCr 9.88, which require a "unanimous" verdict. It is admitted by defendant that he voluntarily consented to a majority verdict before it was [fol. 424] rendered. It is claimed, however, that such consent or waiver violates the "ancient mode of trial by jury" (Section 7, Kentucky Constitution) and public policy.

The only answer of the Commonwealth to this argument, in its brief, is that since the record fails to show otherwise, we must presume the verdict was unanimous. We will assume, however, that only 10 of the 12 jurors agreed upon the verdict. Clearly defendant would have been bound by an agreement to honor the verdict of a 10-man jury. KRS 29.015 specifically authorizes the parties in a misdemeanor case to agree on a trial by a lesser number of persons than 12. The offense with which defendant was charged was a misdemeanor (KRS 431.060).

At first blush it would seem that if a defendant "may agree to a trial by a lesser number of persons" than 12 (KRS 29.015), an agreement to accept a verdict of the majority of a panel of 12 conforms with the statute. It is contended, however, that regardless of the number of jurors, the verdict of that specific number must be *unanimous*, as RCr 9.82(1) and RCr 9.88 provide.

Such view was taken in *Hibdon v. United States*, 204 F. 2d 834, wherein the court followed two lines of reasoning. It was first held that because of the mandatory phrasing of Federal Criminal Rule 31(a), which is substantially the same as RCr 9.82, the requirement of unanimity could not be waived. We are not inclined to accept this conclusion. A vast number of both civil and criminal procedural rules are mandatory in form, but unless they are jurisdictional in nature, or noncompliance will adversely affect the administration of justice, no reason is apparent why a party cannot understandingly and voluntarily waive their requirements.

The second line of approach in *Hibdon* was that under the ancient common law the defendant's guilt had to be proved beyond a reasonable doubt in order to overcome the presumption of innocence, and a verdict of only a majority of the jurors would not meet that requirement since [fol. 425] a dissenting vote would demonstrate the existence of a reasonable doubt. It was suggested that unless the court upheld this high standard upon which a conviction could be based, the prosecutor would have a lesser burden of proof and there might result unjust convictions. Assuming these speculations have some validity, the risk is one which the defendant voluntarily accepts.

The substance of the *Hibdon* opinion relating to the sacredness of a jury trial was keyed to a "humanitarian concept" and "due process". Emphasis was placed upon the historical background and the public interest in the protection of persons accused of crime. In our opinion the reasons making necessary extraordinary solicitation for the defendant's rights have long since disappeared. It will be remembered that under the common law the accused could not testify in his own behalf, he had no right to counsel, and the penalties were extremely severe, usually death. In *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, it was pointed out the ancient doctrine that the accused could waive no rights was based upon those early conditions. Noting that they no longer exist, the

United States Supreme Court decided the accused could waive a 12 man jury and properly agree to be tried by 11 jurors.

The Hibdon opinion sought to distinguish the Patton case and to distinguish between waiving the number of jurors and waiving unanimity. Accepting the latter distinction, we simply cannot find a persuasive reason for a different application of the waiver principle. We will take leave of Hibdon with the observation that the ultimate decision was based on an acceptable ground, i.e., the defendant was coerced into the agreement and therefore it was not voluntarily made. The preliminary conclusions in that opinion which we have discussed fall into the category of dictum. This does not condemn the reasoning but we are not inclined to follow it.

[fol. 426] We think the time has come to abandon the romantic aspects of the ancient mode of trial by jury and consider the matter pragmatically. No one questions the right of a defendant in a criminal case to invoke the protection of any or all of his constitutional rights. On the other hand, we can find no sound reason to deny him the right of waiving procedural requirements which exist principally for his benefit. We have recognized that he can waive a jury completely by pleading guilty. He can waive the right to counsel, the right to freedom from self-incrimination, the right to have excluded evidence obtained by unreasonable search or seizure, and at least in misdemeanor cases, the right to a 12-man jury. On what logical basis is unanimity a more sacred right?

It is true this Court has heretofore adhered to the theory that in a *felony case* the defendant cannot waive a 12-man jury. *Branham v. Commonwealth*, 209 Ky. 734, 274 SW 489; *Tackett v. Commonwealth, Ky.*, 320 SW 2d 299. A serious question may be raised as to whether a valid distinction can be made between the waiver of defendant's rights in felony cases on the one hand and misdemeanors on the other. See *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854; *Waiver of Trial Jury in Felony Cases*

in Kentucky, 48 Ky. L. Journal 457. We do not have that question here and will not re-examine it.

It is our conviction that at least in misdemeanor cases the defendant may waive not only a 12-man jury but unanimity of the jurors in reaching their verdict, provided always that such waiver agreement is entered into *understandingly* and *voluntarily*, and provided of course the Commonwealth agrees and the trial court approves. Since no suggestion is made that the defendant in this case did not understandingly and voluntarily enter into the agreement to accept a majority verdict (and our solicitude for the rights of the defendant can be maintained by careful scrutiny of these two conditions), he was bound by his agreement. We find no error here.

[fol. 427] We have considered carefully each of the six points raised in appellant's brief and find no reversible error.

The judgment is affirmed.

Chief Justice Moremen and Judges Stewart and Milliken dissent on the ground that since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.

[fol. 428] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 429]

## SUPREME COURT OF THE UNITED STATES

No. ...., October Term, 1965

---

STEVE ASHTON, Petitioner,

VS

KENTUCKY

---

ORDER EXTENDING TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI—September 16, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1965.

[fol. 430]

SUPREME COURT OF THE UNITED STATES

No. 619, October Term, 1965

---

STEVE ASHTON, Petitioner,

v.

KENTUCKY

---

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILED

SEP 27 1965

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1965.

No. **619**

STEVE ASHTON,

*Petitioner,*

*against*

COMMONWEALTH OF KENTUCKY,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE COMMON-  
WEALTH OF KENTUCKY.**

EPHRAIM LONDON,

*Attorney for Petitioner,*

1 East 44th Street,

New York, N. Y. 10017.

*On the Petition,*

EPHRAIM LONDON,

DAN JACK COMBS,

HELEN L. BUTTENWIESER.



## INDEX.

---

|  | PAGE |
|--|------|
| Opinions Below .....   | 1    |
| Jurisdiction .....   | 2    |
| The Questions Presented for Review.....  | 2    |
| Constitutional Provisions and Statutes Involved.....   | 4    |
| Statement of the Case.....   | 5    |
| The Manner in Which the Federal Questions Sought<br>to be Reviewed were Raised.....  | 10   |
| Reasons for Allowance of the Writ.....   | 13   |
| Preliminary Statement .....  | 13   |
| The Questions Presented are Substantial.....   | 15   |
| I. Petitioner's conviction in Kentucky of the com-<br>mon law crime of libel (which crime had been<br>defined in several different ways in the few cases<br>in Kentucky in which it was considered) was a<br>violation of due process and the Constitutional<br>guarantee of freedom of the press.....   | 15   |
| II. The offense of criminal libel as defined by the<br>Trial Court in this case was so vague that Peti-<br>tioner's conviction of disobeying the law was a<br>denial of due process and infringed his consti-<br>tutional right of communication.....  | 18   |
| III. No evidence was offered to show that the state-<br>ments about the Chief of Police and the High<br>Sheriff were published with actual malice. Since<br>the publication related to the official conduct of<br>persons holding public office the conviction of<br>Petitioner violated the Constitutional Guarantees<br>of freedom of the press..... | 23   |

|  |     |
|--|-----|
| IV. The convicting of Petitioner of criminal libel without proof that Petitioner published the libel was a denial of due process and a violation of the right to freedom of the press.....         | 25  |
| V. The Petitioner's conviction of criminal libel violated the constitutional guarantee of freedom of the press for the statements made about the complaining witness, Mrs. Nolan, were true.....   | 25  |
| VI. A conviction and punishment for making inaccurate and derogatory statements about the official conduct of public officials violates the constitutional guarantees of freedom of the press..... | 28  |
| CONCLUSION .....   | 29  |
| Appendix A—Opinion and Order.....  | A-1 |

## TABLE OF CASES.

|   | PAGE                      |
|---|---------------------------|
| <i>Browning v. Commonwealth</i> , 116 Ky. 282.....                              | 17                        |
| <i>Cantwell v. Connecticut</i> , 310 U. S. 296.....                             | 16                        |
| <i>Cole v. Commonwealth</i> , 222 Ky. 350.....                                  | 18                        |
| <i>Commercial Pictures Corp. v. Regents</i> , 346 U. S. 587                     | 22                        |
| <i>Commonwealth v. Duncan</i> , 127 Ky. 47.....                                 | 17                        |
| <i>Connally v. General Construction Co.</i> , 269 U. S. 385....                 | 13, 15                    |
| <i>Cox v. Louisiana</i> , 379 U. S. 536.....                                    | 20                        |
| <i>DeJonge v. Oregon</i> , 299 U. S. 353.....                                   | 16                        |
| <i>Edwards v. South Carolina</i> , 372 U. S. 229.....                           | 20                        |
| <i>Garner v. Louisiana</i> , 368 U. S. 157.....                                 | 20                        |
| <i>Garrison v. Louisiana</i> , 379 U. S. 64.....                                | 14, 24, 26, 27, 28, 29    |
| <i>Hague v. C. I. O.</i> , 307 U. S. 496.....                                   | 20                        |
| <i>Henry v. Rock Hill</i> , 376 U. S. 776.....                                  | 20                        |
| <i>Holmby Productions, Inc. v. Vaughn</i> , 350 U. S. 870....                   | 22                        |
| <i>Kingsley International Pictures Corp. v. Regents</i> ,<br>360 U. S. 684..... | 22                        |
| <i>Kunz v. New York</i> , 340 U. S. 290.....                                    | 20                        |
| <i>Lanzetta v. New Jersey</i> , 306 U. S. 451.....                              | 13                        |
| <i>Moity v. Louisiana</i> , 379 U. S. 201.....                                  | 24                        |
| <i>Musser v. Utah</i> , 333 U. S. 95.....                                       | 22                        |
| <i>NAACP v. Button</i> , 371 U. S. 415.....                                     | 23                        |
| <i>Near v. Minnesota</i> , 283 U. S. 697.....                                   | 21                        |
| <i>New York Times Co. v. Sullivan</i> , 376 U. S. 254.....                      | 14, 23, 24,<br>25, 28, 29 |
| <i>Niemtko v. Maryland</i> , 340 U. S. 268.....                                 | 16                        |
| <i>Pierce v. United States</i> , 314 U. S. 306.....                             | 16                        |
| <i>Provident Sav. Life Assur. Soc. v. Johnson</i> , 115 Ky.<br>84 .....         | 17                        |
| <i>Smith v. California</i> , 361 U. S. 147.....                                 | 16                        |
| <i>State v. Burnham</i> , 9 N. H. 34.....                                       | 27                        |
| <i>Stromberg v. California</i> , 383 U. S. 359.....                             | 15                        |

|  | PAGE       |
|--|------------|
| <i>Terminiello v. Chicago</i> , 337 U. S. 1.....       | 20         |
| <i>Thomas v. Collins</i> , 323 U. S. 516.....          | 13         |
| <i>Thornhill v. Alabama</i> , 310 U. S. 88.....        | 16         |
| <i>Tracy v. Commonwealth</i> , 87 Ky. 578.....         | 4, 16      |
| <i>Williams v. North Carolina</i> , 317 U. S. 287..... | 28         |
| <i>Winters v. New York</i> , 333 U. S. 507.....        | 15, 19, 22 |

#### CONSTITUTIONAL PROVISIONS AND STATUTES.

|                             |                     |
|-----------------------------|---------------------|
| United States Constitution, |                     |
| First Amendment .....       | 2, 3, 4, 10, 15, 18 |
| Fourteenth Amendment .....  | 2, 3, 4, 10, 15, 18 |
| Title 28, U. S. C.,         |                     |
| Section 1257(3) .....       | 2                   |
| Kentucky Constitution,      |                     |
| Section 9 .....             | 4                   |
| Kentucky Revised Statutes,  |                     |
| Section 431.075 .....       | 4                   |

#### MISCELLANEOUS.

|   |    |
|---|----|
| <i>Brandt, Seditious Libel; Myth and Reality</i> , 39 N. Y. |    |
| U. L. Rev. 1.....   | 16 |
| <i>Common Law Crimes in the United States</i> , 47 Colum.   |    |
| L. Rev. 1332.....   | 16 |
| 4 <i>Elliot's Debates on the Federal Constitution</i> ..... | 23 |
| Mill, <i>On Liberty</i> , Chapter 2 (MacMillan).....        | 21 |

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1965

---

No.

---

STEVE ASHTON,

Petitioner,

*against*

COMMONWEALTH OF KENTUCKY,

Respondent.

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF THE COMMON-  
WEALTH OF KENTUCKY.**

The Petitioner, STEVE ASHTON, respectfully requests a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky to review a judgment of that Court which affirmed (with three of the seven Judges of the Court dissenting) Petitioner's conviction of criminal libel.

**Opinions Below.**

Petitioner was found guilty after trial by a jury in the Perry Circuit Court of Kentucky (R. 12c). No opinion was given when the judgment of conviction was entered.

The opinion of the majority of the Court of Appeals of the Commonwealth of Kentucky affirming the judgment of conviction and the dissenting opinion of the Chief Justice and of the Judges of that Court who voted to reverse the judgment are set out in Appendix A to this Petition. The opinions have not been officially reported.

### **Jurisdiction.**

The judgment of the Court of Appeals of the Commonwealth of Kentucky sought to be reviewed was entered June 18, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

### **The Questions Presented for Review.**

1. Whether Petitioner's conviction in Kentucky of the common law crime of libel (which crime had been defined in several different ways in the few cases in Kentucky in which it was considered) violated the requirements of due process and the Constitutional guarantee of freedom of the press.

2. Whether the Trial Court's definition of the common law crime of criminal libel was so vague and indefinite as to violate the requirements of due process, and make criminal the publication of matter within the protection of the First and Fourteenth Amendments.

3. Whether convicting Petitioner of criminally libeling public officials without proof that Petitioner was aware of the falsity of the statements attributed to him and without proof that Petitioner published the statements,

was a denial of due process and a violation of Petitioner's right to freedom of the press.

4. Whether Petitioner was deprived of due process and denied his Constitutional right of expression by his conviction of criminal libel, when it was shown on the trial that Petitioner's statements with respect to one of the complaining witnesses were true.

5. Whether Petitioner was denied due process and was deprived of his Constitutional right to freedom of the press by the prosecutor's failure, and the Court's refusal to direct the prosecutor, to advise Petitioner which statements made by Petitioner were said to be libellous and in what respects such statements were false, and in which manner and to whom the statements were published.

6. Whether the affirmance of Petitioner's conviction by the Kentucky Court of Appeals under a definition of the common law crime of criminal libel, different from that of, and in conflict with the definition applied by the Trial Court, constituted a denial of due process and of equal protection of the laws and of Petitioner's right to a hearing on appeal of the question of the Constitutionality of the law as it was applied in his case.

7. Whether a State's conviction and punishment of a person for making inaccurate and derogatory statements about the official conduct of public officials violates the First and Fourteenth Amendment guarantees of freedom of the press.

## Constitutional Provisions and Statutes Involved.

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

The Constitutional provisions of the Commonwealth of Kentucky and the Statutes that are involved are:

### Constitution of Kentucky.

“§9. *Truth May Be Given In Evidence In Prosecution for Publishing Matters Proper for Public Information; Jury to try Law and Facts in Libel Prosecutions.* In prosecution for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the Court as in other cases.”\*

### Kentucky Revised Statutes, Chapter 431. Crimes and Punishments.

“§431.075. *Common Law Offenses, Penalties for.* Any person convicted of a common-law offense, the penalty for which is not otherwise provided by statute shall be imprisoned in the County jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.”

---

\* Under the earlier common-law rule in Kentucky the truth of the matter alleged to be libellous was inadmissible as a defense in a prosecution for libel. The State Constitutional provision was adopted to enable a defendant charged with libel to plead truth in justification. *Tracy v. Commonwealth*, 87 Ky. 578, 584 (1888).

### Statement of the Case

*The following, with minor additions, is the statement of the facts to the Court below, to which the attorney for the Commonwealth of Kentucky agreed.*

Petitioner, Steve Ashton, was indicted for publishing on March 22, 1963, in Perry County "a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs and Mr. and Mrs. W. P. Nolan.\*" At the time of the alleged libel, Sam L. Luttrell was Chief of Police of Hazard, Kentucky (T. 73), Charles E. Combs was Sheriff of Perry County (T. 139) and Mrs. Nolan was co-owner and co-publisher of a newspaper, the Hazard Herald (T. 111). The alleged libellous matter appeared in a mimeographed pamphlet entitled "Notes on a Mountain Strike" (Commonwealth Exhibit 1, T. 84).

Ashton was 20 years old at the time of the alleged offense (T. 178). He had been a student at Oberlin College in Ohio for two and a half years, and left college in February 1963 to come to Hazard, Kentucky (T. 178). There was, at the time, "a period of strife between union and non-union miners" in the area (App. A, p. 11) and Petitioner came in response to an appeal for food, clothing and help for unemployed miners. The appeal was made on a program telecast over a national television network (T. 182).

In his instructions to the jury, the Trial Judge stated that Petitioner was charged with having made the following defamatory statements about Police Chief Luttrell in the pamphlet "Notes on a Mountain Strike":

"Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force.

---

\* The indictment as against Mr. Nolan was dismissed (T. 112).

Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. It's against the law for a peace officer to take private jobs' " (T. 204).

The defense proved that a number of the statements were true. It was shown that people known to Chief Luttrell had considered killing a police officer who sympathized with the striking miners. Kilburn, the officer in question, testified that he had been a Police Lieutenant on the Hazard force, working under Luttrell (T. 188). He testified that he had been told by Chief Luttrell that he would be killed by two men, one a policeman, unless he resigned (i. e., "made a move") (T. 188). On direct examination Luttrell denied that he told Kilburn he would be killed "if he didn't make a move" (T. 201) but on cross-examination by the Court, Luttrell admitted that he told Kilburn that his life might be in danger because of statements he had made (T. 202).

Luttrell indicated that he was libeled by the statement that one night five pickets were needed to guard a policeman. Luttrell testified, in response to a question, that there was no truth whatever to a statement that it took "three (sic) men to guard this one city policeman" (T. 87). However, Charles Moore, a member of the Miners' Relief Committee, testified that he and other pickets had in fact guarded Kilburn's home one night (T. 196, 197).

Luttrell denied, and the defense did not prove that he had an outside job guarding a mine operator's home (T. 87, 88).

According to the Trial Court's instructions to the jury the defamatory statement allegedly made by Petitioner about Sheriff Combs was:

“ ‘The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gun-point.’ ” (T. 204, 205)

Sheriff Combs conceded the truth of many of the statements made about him. He admitted that he was a mine operator, while acting as High Sheriff (T. 141) and that he and the State police escorted miners through the picket lines (T. 146). He admitted that a boy was beaten and gassed, while in jail in his (the Sheriff's) custody, and that the boy recovered a judgment against him for \$5,000, because of the beating (though he denied that he was present at the time the boy was injured and the tear gas was used) (T. 141, 149). The Sheriff also admitted that he was under indictment for manslaughter, as stated in the Notes (T. 149) and that he had not been removed from office (T. 142).

Sheriff Combs also said that he never had as many as 72 deputies, and that he did not hire deputies "exactly" because they wanted to carry guns. (He said *he* wanted them to carry guns) (T. 140, 141). He admitted, however, to having about 48 deputies "on the books", none of whom were unemployed miners (T. 147, 148). The record does not reveal why an issue was made with respect to the number of persons officially and unofficially deputized by the Sheriff, for it was conceded that it had been the policy "if somebody wants to be a deputy sheriff, why, they kind of put 'em on" (T. 94).

The Sheriff denied, and the defense did not prove that he offered \$75,000 in settlement of the charges against him, and that he "probably bought off" the jury (T. 141, 142).

The Petitioner was charged, according to the Court's instructions to the jury, with having made the following defamatory statement about Mrs. Nolan:

" 'The town newspaper, the Hazard Herald, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however, the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1,100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still' " (T. 205).

Mrs. Nolan conceded that her newspaper had taken the position that the miners' strike was fomented by Communists (T. 138) and that it published the quoted statement (T. 120). She admitted that the Hazard Herald received, not \$14,000 but about \$20,000, and some food and clothing, as a result of a televised program about unemployed miners (T. 121, 122); and that only \$1,100 of the money was paid to the pickets (T. 133, 134). She said that she did not know whether the money, food and clothing received by the Hazard Herald had been distributed to scabs (T. 116).

No evidence was offered with respect to the distribution of the pamphlet either by the Petitioner, Ashton, or by any other person. A number of copies were found by the police in a room in a tavern and all were seized by the police (T. 154, 83). Ashton was in the room when the pamphlets were found and taken (T. 83). Mrs. Nolan said she *believed* her husband found a copy of the Notes in her door, but did not know who placed it there (T. 134, 135). She was unable to state when the pamphlet was found because, as she put it, "We had gotten so used to it" (i. e. to such communications) (T. 118).

There was also testimony that 50 or 60 copies of the Notes on a Mountain Strike were "prepared to be mailed" when they were taken by the police (T. 86). The Police Chief, Luttrell, admitted, however, that he did not know of anyone who received a copy of the paper other than the complaining witnesses and the police who were sent to pick up the copies (T. 88).

Before the jury retired, it was instructed by the Court "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable" (T. 208). The jury returned a verdict of guilty, concurred

in by 10 of its 12 members,\* and fixed Ashton's punishment at "six months in prison jail (sic) and \$3,000 fine" (R. 18). A judgment in conformity with the verdict was recorded in the Court's Book of Criminal Trials on November 21, 1963 (R. 18).

**The Manner in Which the Federal Questions  
Sought to be Reviewed were Raised**

(1) The question of whether the conviction of Petitioner for violation of the common law crime of libel violated due process and the Constitutional right of freedom of expression, because the crime had not been clearly and consistently defined in authoritative opinions of the Kentucky Courts, was raised at the trial by motion to dismiss the indictment (R. 5) and in the briefs to, and argument before, the Kentucky Court of Appeals. The Trial Court, by denying the motions to dismiss, held in effect that Petitioner's Constitutional rights were not violated. The Kentucky Court of Appeals passed on the question and concluded that the common law crime of criminal libel "survived" the federal Constitution (App. A, p. 5). The question was also passed on in the dissenting opinion in the Court of Appeals in which it was said: "since the (common) law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." (App. A, p. 16; matter in parenthesis ours).

(2) The question of whether the law as construed in this case is vague and indefinite and violates the First and Fourteenth Amendment guarantees of freedom of the press,

---

\* The trial minutes did not show the number of jurors who agreed upon the verdict. The Attorney General for the Commonwealth stipulated, on the argument of the appeal, that only 10 of the jurors had in fact concurred in the verdict of guilty.

was raised by objections to the Court's instructions to the jury (T. 203) and in the briefs to and argument before the Kentucky Court of Appeals. The Kentucky Court of Appeals noted in the opinion of the Court that the "principal ground urged for reversal is that the nature of the offense was so 'vague' and 'inclusive' that appellant's conviction violated his constitutional rights of freedom of speech and due process. The Court concluded that the definition of the crime is not unconstitutionally "uncertain." (App. A, p. 9).

(3) The question of whether Petitioner's conviction of criminal libel was without due process and infringed the Constitutional guarantee of freedom of the press because of the absence of any proof of malice or of publication of the libel, was raised in the briefs and argument to the Kentucky Court of Appeals. The Court of Appeals passed on the question and ruled, without reference to the evidence, that publication was proved (App. A, p. 2) and it ruled that "*independent* proof of malice" was not required and that the jury in the Trial Court was reasonably justified in concluding that Petitioner was actuated by actual malice from certain facts of the case. (App. A, pp. 10-11).

(4) The question of whether Petitioner was deprived of due process and denied his Constitutional right to publish freely because he was judged guilty pursuant to a single general verdict and the evidence did not support the charge that he published false matter degrading or injuring Mrs. W. P. Nolan, was raised in the brief to, and argument before the Kentucky Court of Appeals. The Court of Appeals passed on the question in holding "there was sufficient evidence that the statements accusing her of a breach of trust in the distribution of certain funds were in essence false." (App. A, p. 2).

(5) The question of whether Petitioner was denied Due Process by the failure of the indictment and of the Court (in denying Petitioner's motion for particulars) to advise Petitioner of the particular statements for which he was being prosecuted and in what respects the statements were false and how and to whom it was published, was raised in the Trial Court by motions to dismiss the indictment (R. 3-4) and for a bill of particulars (R. 11-12). The Trial Court in effect ruled that Petitioner was not denied due process by denying both motions. The question was raised in the Kentucky Court of Appeals in the brief to, and argument before the Court. The Court of Appeals, in passing on the question, held that the denial of Petitioner's motion for a bill of particulars was "error" but added "There is no suggestion defendant was not fully aware that he was being prosecuted for the libelous matter, concerning the specifically named prosecuting witnesses, which appeared in 'Notes on a Mountain Strike', or that he did not have a copy of this printed material. . . . We cannot find the denial of defendant's motion in any way prejudiced his defense" (App. A, p. 12).

(6) The question of whether Petitioner was denied Due Process by the affirmance, by the Kentucky Court of Appeals, of Petitioner's conviction under a different definition of the crime from that applied by the Trial Court, was not raised below in that manner. The question could not have been raised before the Court of Appeals made its determination in this case. However, a related issue was argued before the Court, and in a letter sent to the Chief Justice and the Judges of the Kentucky Court of Appeals, at their request, Petitioner wrote:

"To retroactively change the definition of a crime on the appeal from a conviction of the offense would also deny the opportunity to present an effec-

tive defense. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta v. New Jersey* (1939), 306 U. S. 451, 453. One charged with offending against a penal statute cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally v. General Construction Co.* (1926), 269 U. S. 385, 391, 392-393, 395; *Thomas v. Collins* (1945), 323 U. S. 516, 529-30, 534-35."

(7) The question of whether the prosecuting, imprisoning and fining of Petitioner for making false, derogatory statements about the official conduct of public officials violates the Constitutional guarantees of freedom of the press, was raised in the trial court by motion to dismiss the indictment (R. 11-12). The Trial Court, by denying the motion, held in effect that such prosecution and punishment did not inhibit freedom of the press. The question was raised in the brief to, and argument before, the Court of Appeals and the Court ruled against that argument by affirming the conviction.

### **Reasons for Allowance of the Writ.**

The questions raised are substantial in that they involve the fundamental right to freedom of the press and the right of untrammelled political discussion and the right to publicly criticize public officials (who in this case had been guilty of improper conduct).

### **Preliminary Statement**

One of the questions raised that this Court has not yet passed on, is whether the Constitution prohibits enforcement of a State common law rule making certain com-

munications criminal, when the common-law doctrine has not been clearly and consistently set out in State Court opinions, and is a protean concept being formulated on a case to case basis.

Another question presented that this Court has not yet passed on, is the nature and quantum of proof of publication, that the Constitution requires to sustain a conviction for criminal libel.

One of the questions presented here was determined by this Court in *Garrison v. Louisiana*, 379 U. S. 64, and *New York Times Co. v. Sullivan*, 376 U. S. 254. The decision in the Court below sustaining a conviction of a criminal libel, which the Trial Court defined as "any writing calculated to create disturbances of the peace, corrupt public morals, or lead to any act which when done is indictable" (T. 208) is in conflict with the precepts of the *Garrison* and *Sullivan* cases.

Another issue raised here that was determined by the courts below in a manner inconsistent with this Court's opinion in *New York Times Co. v. Sullivan*, 376 U. S. 254, relates to the nature of the proof required to sustain a showing of actual malice in a prosecution for criminally libelling a public official. In the *Sullivan* case, the Court held that in a case involving libel of public officials malice could not be presumed but was required to be proved (376 U. S. 254, at pp. 283-284). In the instant case the Court assumed that Petitioner acted with malice because Petitioner had opposed the position taken by the public officials in a dispute between non-union and union miners, and from the fact that Petitioner did not know the officials or ask them whether the statements made about them were true (App. A, p. 11).

Another question here presented that has not been decided by this Court is whether the Constitution requires a State prosecuting a defendant for criminal libel to advise

him of the statements for which he is prosecuted, and when and how they were published, and in what respects it is claimed they were false.

### **The Questions Presented are Substantial**

**I. Petitioner's conviction in Kentucky of the common law crime of libel (which crime had been defined in several different ways in the few cases in Kentucky in which it was considered) was a violation of due process and the Constitutional guarantee of freedom of the press.**

It is a horn book rule that a criminal law must be sufficiently clear and definite that men of common intelligence will understand its meaning. The conviction of a person under a vague law violates one of the fundamental requirements of due process, namely, that one must have reasonable notice or an opportunity to learn that conduct is condemned by law before he can be punished for it. *Connally v. General Construction Co.*, 269 U. S. 385, 391-393; *Stromberg v. California*, 283 U. S. 359, 369; *Winters v. New York*, 333 U. S. 507, 515, 518.

Where a vague law attempts to punish or regulate communication, it must be held unconstitutional also because it inhibits freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution. In *Winters v. New York*, 333 U. S. 507, Mr. Justice Reed, speaking for the Court, said (at p. 509):

“A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions

against expressions protected by the principle of the First Amendment, *violates an accused's rights under procedural due process and freedom of speech or press*" (emphasis ours).

See also *Thornhill v. Alabama*, 310 U. S. 88, 96-98; *DeJonge v. Oregon*, 299 U. S. 353; *Niemotko v. Maryland*, 340 U. S. 268, 271-272, and *Smith v. California*, 361 U. S. 147, 150-151.

The rule, that a penal law that fails to give fair warning of the conduct that will be held criminal, violates the requirements of Due Process, applies with particular force to a common law crime that is not set out in the statute books, but is being formulated, as stated in the dissenting opinion in the Court below, "on a case to case basis" (App. A, p. 16). See *Cantwell v. Connecticut*, 310 U. S. 296; *Pierce v. United States*, 314 U. S. 306, 311; *Common Law Crimes in the United States*, 47 Colum. L. R. 1332; Brandt, *Seditious Libel; Myth and Reality*, 39 N. Y. U. L. R. 1.

We are not concerned here with a common law concept that, by a number of consistent interpretations and applications by the courts, has acquired definite and concrete meaning so that those within its purview may be deemed to have notice of its effect. Before Petitioner's conviction there were only six authoritative opinions by Kentucky courts that discussed or attempted to define the common law crime. Those cases were decided during the period from 1895 to 1927, and the definitions of the crime vary in the several opinions.

In *Tracy v. Commonwealth*, 87 Ky. 578 (1888), the Court held:

"Libel is a public wrong. The publication is in effect a breach of the peace; it produces public mischief and for that reason is an indictable offense. It is

a breach of the peace whether published as to one or more persons" 87 Ky. at 584.

In *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84 (1903), a civil suit for malicious prosecution for criminal libel, the Court said "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable."

*Browning v. Commonwealth*, 116 Ky. 282 (1903), merely states that:

"... where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society" (116 Ky. at 285).

In *Commonwealth v. Duncan*, 127 Ky. 47 (1907), the Court said:

"The rule as to what is libelous is thus stated in 2 Roberson, Crim. Law, 586: 'Libel is an offense at common law, and is defined to be any false and malicious publication which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or to bring him into contempt, hatred or ridicule, or which accuses him of any crime punishable by law, or of any act odious and disgraceful to society.' In 2 Bishop on Crim. Law, section 907, the crime is defined in these words: 'The offense of libel is founded on the doctrine of attempt. It is any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.'" (127 Ky. at pp. 52-53).

And *Cole v. Commonwealth*, 222 Ky. 350 (1927) the most recent Kentucky case on the subject (prior to the one at bar) defines criminal libel as:

“*any false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society.*” (Emphasis ours, 222 Ky. at 358).

It cannot be said, on the basis of that body of case law, that the common law of criminal libel in Kentucky had the definiteness and clarity the Constitution requires of a penal law.

**II. The offense of criminal libel as defined by the Trial Court in this case was so vague that Petitioner's conviction of disobeying the law was a denial of due process and infringed his constitutional right of communication.**

The definition of the crime applied in this case was so broad and unclear as to permit the punishment of lawful conduct within the protection of the First and Fourteenth Amendments to the Constitution. The Court instructed the jury that Ashton was guilty of criminal libel if *Notes on a Mountain Strike* was “calculated to create disturbances (sic) of the peace, corrupt the public morals or lead to any act, which, when done, is indictable” (T. 208). No part of the Court's definition furnished any reasonably definite standard to guide the jury in its determination in this case. We must assume that the word *calculated* in the

Trial Court's definition refers to the probable consequence of the language, and not to the writer's intent, for his intent alone could not be punished. The jury then was left free to determine whether the language used in Notes on a Mountain Strike would *be likely* to influence the reader to breach the peace or to commit a criminal or an immoral act.

In *Winters v. New York*, 333 U. S. 507, 518-519 (1948), the Court held unconstitutionally vague a statute that prohibited the publishing of material "so massed as to become vehicles for inciting violent and depraved crimes against the person." The Court found "the specification of publications prohibited from distribution, too uncertain and indefinite" to sustain any criminal conviction (333 U. S. at p. 519). Although the language of the statute in the *Winters* case was, we believe, more informative than the definition in the instant case, the Court there found it was impossible for those subject to the law, or those charged with its enforcement, to know where to draw the line between allowable and forbidden publications and as a result innocent conduct might be punished, or a person might be dissuaded from publishing proper material in the belief that it came within the ambit of the law. "The clause," Justice Reed wrote, in *Winters v. New York*, 333 U. S. at p. 519, "proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person . . . It is not an effective notice of new crime. The clause has no technical or common-law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears . . . 'It leaves open, therefore, the widest conceivable inquiry, the scope of

which no one can foresee and the result of which no one can foreshadow or adequately guard against.' ”

In *Garner v. Louisiana*, Mr. Justice Harlan wrote in his concurring opinion, in language directly applicable to the Trial Court's definition of criminal libel in this case (368 U. S. 157, at p. 202):

“But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, *it cannot do so by means of a general and all-inclusive breach of the peace prohibition*. It must bring the activity sought to be proscribed within the ambit of a statute or clause ‘narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.’ ” (Emphasis ours.)

See also *Edwards v. South Carolina*, 372 U. S. 229, *Henry v. Rock Hill*, 376 U. S. 776 and *Cox v. Louisiana*, 379 U. S. 536.

It is doubtful if any law, even if precisely worded, could constitutionally punish a publication because the publication *might* lead to a breach of the peace. If people become disorderly after receiving a communication, the conduct of those participating in the disorder should be punished, but not the communication. (We are not here concerned with direct incitement to a violation of law.) The disorder or disturbance of the peace would arise from the violence of the audience's reaction, and the authorities would be obliged to restrain the audience, not to prohibit speech or expression. *Kunz v. New York*, 340 U. S. 290, 294, 295; *Terminiello v. Chicago*, 337 U. S. 1; *Hague v. C. I. O.*, 307 U. S. 496, 516.

If an utterance could be prohibited because it *might* arouse an audience to violence, then, as John Stuart Mill noted, the "least educated and most intemperate citizens would become the arbiters of permissible expression." John Stuart Mill, *On Liberty*, Chapter 2 (MacMillan). As Chief Justice Hughes said in *Near v. Minnesota*, 283 U. S. 697, 722:

"The danger of violent reactions becomes greater with effective organization of defiant groups . . . and if this consideration warranted legislative interference with the national freedom of publication, constitutional protection would be reduced to a mere form of words."

The Kentucky Court of Appeals acknowledged, in its opinion below, that the "broad common law concept of what constituted a 'breach of peace' is no longer a constitutional basis for imposing criminal liability" (App. A, p. 8). It maintained, however, that the Trial Court's reference to that "obsolete" concept in its instructions did not violate Petitioner's constitutional rights because (1) the common law offense of criminal libel is no longer founded on the tendency of the defamatory words to cause a breach of the peace (App. A, p. 7) and (2) the requirement that the language lead to a breach of the peace was merely descriptive of the kind of derogation of persons that the common law condemned (App. A, p. 7).

Unfortunately for Petitioner, the Trial Judge and jury who tried him were not aware that the concept was obsolete or that it was merely descriptive of the language that was supposedly, in other respects, defamatory of the complaining witnesses. The jury was instructed that Petitioner was guilty of criminal libel if the language used by him with respect to the complaining witnesses was "false

and libellous" (T. 207) and was "known to be false and libellous" (T. 207) and the "legitimate inferences to be drawn from the language used . . . is false and libellous" (T. 207). The term libellous or criminal libel was then defined for the jury as "any writing calculated to create disturbances of the peace etc." (T. 208). It must be assumed that the jury, in finding the Petitioner guilty, believed that the crime consisted of the making of false statements that would tend to corrupt morals, or cause a breach of the peace or was likely to lead to an illegal act.

The phrase "calculated to . . . corrupt the public morals", in the Trial Court's description of publications that must be held criminal under the law, has also been held too indefinite to meet constitutional requirements when used in a statute regulating speech or press. *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Musser v. Utah*, 333 U. S. 95; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587\* (decided under the caption *Superior Films v. Dept. of Education of State of Ohio*); *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870.\*

The Court below, it will be recalled, also defined as criminally libelous "any writing calculated to . . . lead to any act which . . . is indictable". The clause "lead to any act which, when done, is indictable" is no more definite and has the same meaning as the phrase "tend to incite to crime" which, in *Winters v. New York*, 333 U. S. 507, was held too general to furnish the standards essential for the guidance of a court or jury.

---

\* The cited opinions are memorandum opinions. The statutes held unenforceable will be found in the opinions of the lower courts.

**III. No evidence was offered to show that the statements about the Chief of Police and the High Sheriff were published with actual malice. Since the publication related to the official conduct of persons holding public office the conviction of Petitioner violated the Constitutional Guarantees of freedom of the press.**

The statements that Petitioner allegedly published about the High Sheriff and the Chief of Police, were unpleasant, and may have been inaccurate in part,—(although substantially true). But they were all made as part of a document written to describe the conditions then existing in Hazard and Perry County, and to call to account the public officials who were thought responsible. It should be noted that the situation in Hazard was of public interest, and was the subject of one or two television programs broadcast nationally by Columbia Broadcasting Company (T. 121). The constitutional protection afforded statements made in criticism of the conduct of public officers extends, where the statements are not made with evil intent, to half truths, misinformation, exaggerations and inaccuracies. The protection does not turn upon “the truth, popularity, or social utility of the ideas and beliefs which are offered.” *NAACP v. Button*, 371 U. S. 415, 445 (1963). “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” 4 *Elliot’s Debates on the Federal Constitution* p. 571 (cited with approval in *New York Times Co. v. Sullivan*, 376 U. S. 254, at p. 271).

In its opinion below the Kentucky Court of Appeals conceded that *New York Times Co. v. Sullivan*, 376 U. S. 254,

and *Garrison v. Louisiana*, 379 U. S. 64, require a showing of actual malice to support a recovery in a civil action, and a conviction in a criminal case, for the libelling of public officials (App. A, p. 10). The Court of Appeals ruled, however, (we believe erroneously) that *independent* proof of malice was not required (App. A, p. 10).

The Kentucky Court of Appeals found that the jury in this case was justified in concluding that Petitioner was motivated by actual malice because he "was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant (Petitioner) and the prosecuting witnesses were in opposing camps." (App. A, p. 11, matter in parentheses ours).

The facts, that Petitioner did not know the complaining witnesses and was unfamiliar with the place where they lived, did not warrant the inference that he bore them ill will. Nor may it reasonably be assumed that Petitioner was evilly disposed toward the complaining witnesses because they had opposing views about a dispute between mine workers—in which Petitioner was not directly involved. Petitioner's failure to confront the Police Chief and Sheriff with the statements about their misconduct is certainly not strange under the circumstances, and may not be held evidence of malice. In *New York Times Co. v. Sullivan*, 376 U. S. 254, this Court found that the newspaper's failure to check the accuracy of matter in an advertisement it published, and its failure to check the matter even against its own files, did not show malice with "the convincing clarity the constitutional standard demands" 376 U. S. at pp. 286-287. See also *Moity v. Louisiana*, 379 U. S. 201 (*per curiam*).

**IV. The convicting of Petitioner of criminal libel without proof that Petitioner published the libel was a denial of due process and a violation of the right to freedom of the press.**

A libel is not punishable as a criminal offense unless the libel has been published or distributed by the accused to some one other than the person said to have been denigrated. In the instant case the alleged libellous pamphlet offered in evidence was one of those seized by Police Chief Luttrell when he arrested the Petitioner Ashton (T. 83). Other copies were obtained by police officers, acting under the instructions of the prosecuting witness, Chief Luttrell (T. 78-80). The evidence that Mr. and Mrs. Nolan found a copy of the pamphlet in their door cannot be held proof of willing and knowing publication by the Petitioner, for there was no evidence that the copy was placed there by Ashton or at his instance.

Since there was no evidence that a single copy of the pamphlet was delivered or published to anyone by Petitioner, the judgment of conviction "constitutes a forbidden intrusion on the field of free expression" *New York Times Co. v. Sullivan*, 376 U. S. 254, 285.

**V. The Petitioner's conviction of criminal libel violated the constitutional guarantee of freedom of the press for the statements made about the complaining witness, Mrs. Nolan, were true.**

The statement made by Petitioner that was said to be "libellous and defamatory" of Mrs. Nolan was:

" 'The town newspaper, the Hazard Herald, has hollered that " 'the commies have come to the mountains of Kentucky' " and are leading the strike. The

Herald was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still,' ' (T. 205)

To justify criminal prosecution for libel, the defamation should, we believe, charge serious vice or disgraceful behavior or scandalous misconduct "which exceptionally disturbs the community's sense of security" (quoted in *Garrison v. Louisiana*, 379 U. S. 64 at p. 70). There is no indication, in any of the Kentucky cases dealing with criminal libel, of the nature of the defamation that may be punished (other than that it tend to lead to a breach of the peace). Although the charge against Mrs. Nolan does not appear sufficiently grave to warrant imprisoning the Petitioner for having made it, the Kentucky Court of Appeals held the statement punishable because it found that it, in effect, accused her of a breach of trust (App. A, p. 2).

Assuming that the quoted language did on its face, and without proof of innuendo, charge Mrs. Nolan with a heinous wrong, it may not be held libellous because it was shown to be true in every essential respect. The pamphlet stated: (1) That the newspaper owned by the Nolans accused the Communists of fomenting the strike (*that was in fact the newspaper's position* (T. 138)); (2) that the news-

paper received over \$14,000 and food and clothing (*the paper did receive approximately \$20,000 and food and clothing* (T. 121)); (3) that the money was sent as a result of a television broadcast about the plight of miners in the area. (*Mrs. Nolan conceded that the money was contributed as a result of television broadcasts* (T. 121) *at least one of which was "devoted almost exclusively to the unemployed coal miners"* (T. 122)); (4) that only \$1100 of the money received by the newspaper was used to aid the striking pickets and none of the food and clothing was given to them (*the pickets received only \$1100 from the fund and no food or clothing was distributed to them* (T. 133)); (5) that some of the food and clothing received was still undistributed and remained under lock and key (*some of the clothing was still undistributed at the time of the trial and was then in a warehouse under lock and key* (T. 121, 134)).

The Trial Judge, in commenting on the case with respect to the alleged defamation of Mrs. Nolan, said (T. 173):

"She hadn't given the pickets but Eleven Hundred Dollars, and she hadn't distributed all of the things that had been sent. She does have part of them left, and what she's going to do with it, God Almighty only knows. I don't."

And the Trial Judge added that Petitioner "came pretty close (to the truth) on Mrs. Nolan" (T. 173) (language in parentheses ours).

As Mr. Justice Brennan wrote for the Court in *Garrison v. Louisiana*, 379 U. S. 64:

"... We agree with the New Hampshire court in *State v. Burnham*, 9 N. H. 34, 42, 43, 31 Am. Dec. 217, 221 (1837):

'If upon a lawful occasion for making a publication, he has published the truth, and no more,

there is no sound principle which can make him liable, even if he was actuated by express malice . . . ' (379 U. S. at p. 73)

\* \* \* \* \*

" . . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned . . . " (379 U. S. at p. 74)

Since the verdict of guilty in this case was a general one without any special finding, it is not possible to identify the particular statement for which Petitioner was convicted and the verdict must be set aside if proof with respect to any of the three alleged libels was insufficient in law. In *Williams v. North Carolina*, the Court said, 317 U. S. 287, 291-292 (1942):

"If one of the grounds for conviction is invalid under the Federal Constitution the judgment cannot be sustained. . . . To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

# **VI. A conviction and punishment for making inaccurate and derogatory statements about the official conduct of public officials violates the constitutional guarantees of freedom of the press.**

The prevailing view of this Court, set forth in *New York Times v. Sullivan*, 376 U. S. 254, and in *Garrison v. Louisiana*, 379 U. S. 64, is that if constitutional safeguards are observed, there may be a criminal prosecution for the defaming of public officials with respect to their conduct in office. This case furnishes occasion for reconsideration

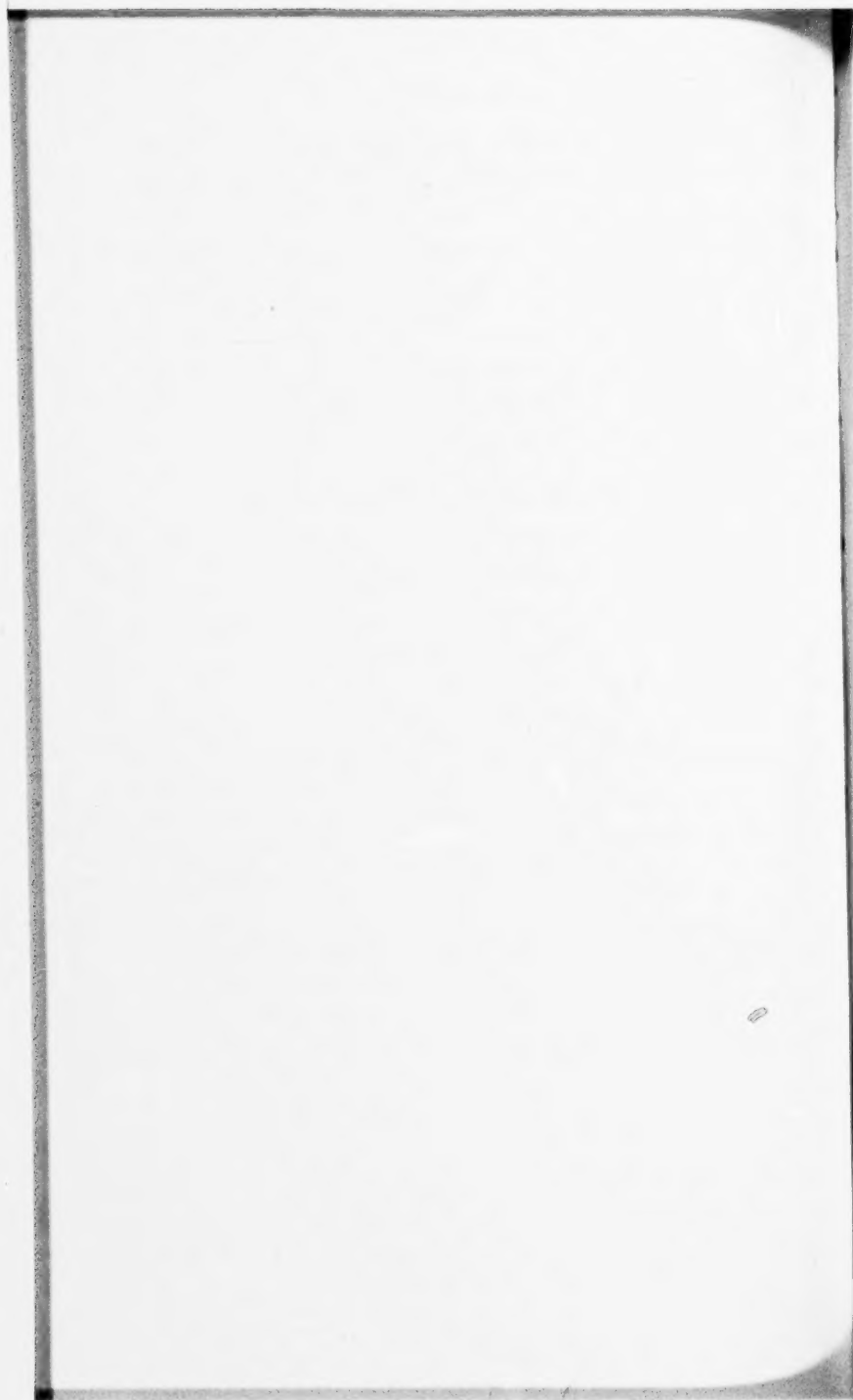
of that view. See *New York Times v. Sullivan*, 376 U. S. 254, 293, 297 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg) and *Garrison v. Louisiana*, 379 U. S. 64, 79 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg).

**For the reasons outlined, the questions presented are substantial, this Petition should be granted and plenary consideration of the issues is warranted.**

Respectfully submitted,

EPHRAIM LONDON,  
Attorney for Petitioner.

On the Petition,  
EPHRAIM LONDON,  
DAN JACK COMBS,  
HELEN L. BUTTENWIESER.



**APPENDIX A.**

**Opinion and Order.**

Rendered June 18, 1965

**COURT OF APPEALS OF KENTUCKY.**

---

STEVE ASHTON,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

---

APPEAL FROM PERRY CIRCUIT COURT

HON. COURTNEY C. WELLS, JUDGE

OPINION OF THE COURT BY COMMISSIONER CLAY  
AFFIRMING.

Appellant was convicted of the *common law crime of criminal libel* and his punishment fixed at six months in jail and a \$3,000 fine. The principal ground urged for reversal is that the nature of the offense was so "vague" and "inclusive" that appellant's conviction violated his constitutional rights of freedom of speech and due process.<sup>1</sup> This raises a novel and serious question which we will dispose of first.

The charge in the indictment is as follows:

"On or about the 22nd day of March, 1963, in Perry County, Kentucky, the above named defendant committed the offense of criminal libel, by publishing a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs,

---

<sup>1</sup>Under the first and fourteenth amendments to the United States Constitution.

*Opinion and Order.*

Mr. and Mrs. W. P. Nolan, against the peace and dignity of the Commonwealth of Kentucky."

Sam Luttrell was the chief of police of Hazard, Kentucky; Charles Combs was the sheriff; Mr. and Mrs. Nolan edited a local newspaper. The alleged defamatory matter appeared in a printed pamphlet entitled "Notes on a Mountain Strike", which was written by the defendant. He was a college student from Ohio who had come to Hazard to help unemployed miners in that area. This was a time of serious unrest in Perry County.

Although defendant raises some question about it, there is no doubt that the evidence proved "publication" of this pamphlet. The proof further establishes, and defendant admits, that certain statements therein, referring to the chief of police and the sheriff, were defamatory per se and were false. Though defendant contends the statements made about Mrs. Nolan (Mr. Nolan is not involved) were true, there was sufficient evidence that the statements accusing her of a breach of trust in the distribution of certain funds were in essence false.

By instructions to the jury the trial court made a most commendable effort to identify the crime more fully than was done in the indictment. To convict, the jury was required to find the defendant "did unlawfully publish \* \* \* certain libelous and defamatory matter" which was "false and libelous, and was so known to be false and libelous when published by the defendant, and was written and published by him solely and for the purpose of bringing (the complaining witnesses) into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation (of the complaining witnesses) \* \* \*."

The court further instructed "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable"; and that "malice" was

*Opinion and Order.*

"an essential element of the offense". The jury was also advised that truth of the statements was a complete defense. These instructions were in fact so comprehensive in detailing different aspects of the crime (although omitting a definition of "malice") as to be somewhat confusing. However, defendant claims no specific error in the instructions.

The basic contention is that the case law of Kentucky does not adequately define the crime, and the trial court's attempt to delineate its elements was so vague, multifarious, and indefinite, and so inclusive of innocent acts, that the law lacks certainty with respect to the conduct condemned. Therefore, it is argued the conviction of the defendant deprived him of both the right of free speech and due process of law.

We will assume, although as far as we can discover after exhaustive research no case has decided this particular point, that the same certainty required of a criminal statute applies to a *common law crime*. See *Sullivan v. Brawner*, 237 Ky. 730, 36 SW 2d 364; *Roberts v. United States*, 226 F. 2d 464; *Winters v. New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840; *American Communications Association, CIO v. Douds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 1391.

It is true that the offense of criminal libel has been subjected to stress and strain through its long period of development since the existence of the Court of the Star Chamber in England around the year 1600.<sup>2</sup> A distinction was then recognized between defamation of a private person and a public official (which has continued to this day). With respect to the former, the real offense was the tendency of defamatory words *to incite a breach of the peace*. Where a public official was involved, criminality consisted

<sup>2</sup> The historical background hereafter given was taken principally from an article entitled *Constitutionality of the Law of Criminal Libel*, 52 *Columbia Law Review* 521 (1952), and an article, *Seditious Libel: Myth and Reality*, by Ervin Brandt, 39 *New York University Law Review* 1 (1964). Other texts examined have been *Odgers on Libel and Slander* (6th Ed.), and *Newell, Slander and Libel* (4th Ed.).

*Opinion and Order.*

of the *scandalous attack upon the government*. This latter was *sedition* libel, a political offense,<sup>3</sup> and most prosecutions for criminal libel in the United States seem to reflect shadows of this long since discredited ground of criminality.

It has been roundly questioned whether there ever was actually a *common law* crime of seditious criminal libel in England,<sup>4</sup> or if so, whether it survived the first amendment to the federal constitution.<sup>5</sup> In any event, it is certain that the English crime, as such, was not imported into the United States. This conclusion is inescapable when we consider the elements of the English crime, which constitutions, statutes and court decisions have substantially modified. One could be guilty of criminal libel under the English law without a showing of (1) malice, (2) falsity, or (3) publication, and (4) without a jury's finding the published matter was libelous. That was the status of the so-called common law criminal libel of England when written constitutions were adopted in the United States. It was against this background that the right of freedom of speech was recognized.

The first amendment to the Constitution of the United States provides that: "Congress shall make no law \* \* \* abridging the freedom of speech, or of the press; \* \* \*."

Section 1 (subsection four) of the Kentucky Constitution recognizes as an inalienable right of all men: "The right of freely communicating their thoughts and opinions."

Section 8, Kentucky Constitution, provides in part: "Every person may freely and fully speak, write and print

<sup>3</sup> See Plucknett, *A Concise History of the Common Law* (5th Ed.) page 489.

<sup>4</sup> *Seditious Libel; Myth and Reality*, by Ervin Brandt, 39 New York University Law Review 1 (1964).

<sup>5</sup> Mr. Justice Holmes, dissenting, in *Abrams v. United States*, 250 U. S. 616, 630; concurring opinions of Justices Douglas, Black and Goldberg in *Garrison v. Louisiana*, ..... U. S. ....; 85 S. Ct. 209, 13 L. Ed. 2d 125; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963).

*Opinion and Order.*

on any subject, being responsible for the abuse of that liberty."

Section 9, Kentucky Constitution, provides: "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."<sup>6</sup>

The above passages clearly show that both federal and state governments were attempting in some manner to escape the abuses of criminal libel prosecutions in England when they were written into American constitutional law. Also, with adoption of these provisions, emphasis shifted from the protection of political institutions to the protection of the individual's right of free expression. As an original proposition it would have been neither difficult nor unreasonable for the courts of this country thereafter to conclude that the common law crime of criminal libel had not survived our federal and state constitutions. There is respectable authority for that view even today.<sup>7</sup>

However, the fact remains that the crime of criminal libel is recognized and enforced throughout the United States. While many states have made the offense a statutory crime, the courts of those states which have not legis-

<sup>6</sup> This section of the Kentucky Constitution incorporated the two important provisions of Section 3 of the Federal Sedition Act of 1798, 1 U. S. Stat. 596, 597, which stemmed from the English Fox Libel Act of 1792, 32 Geo. 3, Ch. 60. The provision with respect to jury function did not effect any change in the mode of jury trial. *Walston v. Commonwealth*, 32 KLR 535, 106 SW 224.

<sup>7</sup> See the concurring opinions of Mr. Justice Douglas, Black and Goldberg in *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 2d 125; *Irvin Brandt, Seditious Libel; Myth and Reality*, 30 New York University Law Review 1; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924.

*Opinion and Order.*

lated on the subject have acknowledged the existence of the crime in its common law form.<sup>8</sup> In the only two cases we have found where the question was squarely presented as to whether the common law crime survived in the United States, the answer, after careful consideration, was in the affirmative. *Commonwealth v. Whitmarsh* (Mass. 1836), *Thacher's Criminal Cases* (page 441), and *Commonwealth v. Chapman*, 13 Mass. (13 Metcalf) 68 (1847).

In Kentucky, as heretofore noted, section 9 of the Constitution refers to "indictments for libel". Section 132 of the Criminal Code dealt with such indictments. In at least six Kentucky cases this Court has recognized the common law crime. *Tracy v. Commonwealth*, 87 Ky. 578, 9 SW 822 (1888); *Smith v. Commonwealth*, 98 Ky. 437, 17 KLR 1010, 33 SW 419 (1895); *Browning v. Commonwealth*, 116 Ky. 282, 76 SW 19 (1903); *Commonwealth v. Duncan*, 127 Ky. 47, 104 SW 997 (1907); *Yancey v. Commonwealth*, 135 Ky. 207, 122 SW 123 (1909); *Cole v. Commonwealth*, 222 Ky. 350, 300 SW 907 (1927). It is significant that in none of those cases did the defendants question the nature of the crime or the certainty of the elements of which it consisted. While the same questions were not involved in each case, and while in none of them do we find a comprehensive definition of criminal libel, they jointly recognize its four basic elements: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice.

Some of these cases made reference to another aspect of the crime which defendant contends contributed to the vagueness and uncertainty of the law. This was the tendency of the defamatory words to lead to a "breach of the peace". In the *Tracy* case it was said "the publication is, in effect a breach of the peace". In the *Duncan* case it was said that the publication "was manifestly calculated to create a disturbance of the public peace". In the *Browning* case it was said "the publication amounts

<sup>8</sup> *Beauharnais v. Illinois*, 343 U. S. 250, 265, 72 S. Ct. 725, 96 L. Ed. 919.

*Opinion and Order.*

to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society". In the *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84, 72 SW 754 (1903), a civil suit for malicious prosecution for criminal libel, the court said "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable".

It is defendant's contention that to define the crime in terms of its tendency to cause a "breach of the peace" or lead to an indictable act is too indefinite to identify criminal conduct. There are two answers to this argument.

In the first place, the quoted statements from our cases simply refer to the *nature of the writing* which would constitute the basis of the charge of criminal libel. In those cases it was assumed that words which were defamatory per se were sufficiently offensive to be criminally libelous, provided the other elements of the crime were established. In those cases, as in the one before us, there was no issue concerning the defamatory nature of the published matter. Consequently the possible uncertainty of the concepts of "breach of the peace" or "indictable offense", as descriptive of the nature of defamatory matter, does not unstabilize the essential elements of the offense with which defendant was charged.

In the second place, in the development of the common law of criminal libel in the United States the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a "breach of the peace" or to induce others to commit a public offense.

It has been observed:

"Whatever validity the former ground—keeping the peace—had historically was 'rejected with finality (over) fifty years ago.' Originally, criminal libel laws emphasized the state's concern with the prevention of sedition and turbulence. Even later expansion to ordinary or nonpolitical defamation

*Opinion and Order.*

could be explained as an effort to provide a substitute for the self-help remedy of the duel. After the passing of the custom of dueling, the common-law development could no longer be justified in terms of the interest in preservation of peace. Once truth was recognized as a complete defense, at least in the civil action, it was perfectly clear that the interest being served was no longer keeping of the peace."<sup>9</sup>

The erosion of the "breach of the peace" justification for criminal libel laws was recognized in *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 2d 125. See also Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale Law Journal* 877, 924 (1963).

In fact the ancient broad common law concept of what constituted a "breach of the peace" is no longer a constitutional basis for imposing criminal liability. *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. See also *Edwards v. South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 697; *Henry v. City of Rock Hill*, 376 U. S. 776, 84 S. Ct. 1042, 12 L. Ed. 2d 79; *Cox v. Louisiana*, ..... U. S. ...., 85 S. Ct. 453, 13 L. Ed. 471; *Constitutionality of the Law of Criminal Libel*, 52 *Columbia Law Review* 521, 528 (1952).

None of our Kentucky cases based the criminality of the act upon the tendency to cause a "breach of the peace" or the commission of an "indictable offense". To the extent they defined the defamatory nature of the words in these terms, they are obsolete. In our latest case on the subject, *Cole v. Commonwealth*, 222 Ky. 350, 300 S. W. 907 (1927), which perhaps came closer to defining the crime than any of our other opinions, no mention is made of the possibility

---

<sup>9</sup> Libel and the First Amendment—A New Constitutional Privilege, by Arthur L. Berney, 51 *Virginia Law Review* 1, 40 (1965).

*Opinion and Order.*

of public disturbance which might be incited by the publication.

We conclude, therefore, that defendant cannot fairly claim that an outmoded aspect of the impact of the defamatory words made uncertain the kind of conduct for which he was prosecuted and convicted.

As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice. There is no uncertainty in the law about what constitutes (1) publication, (2) defamatory words, or (3) falsity. There is a certain indefiniteness concerning the nature of malice but we find this difficulty with that term throughout the criminal law.<sup>10</sup>

In *Riley v. Lee*, 86 Ky. 603, 11 ALR 586, malice was defined as the intentional publication of defamatory matter "without justifiable cause". This was a civil suit but it is a broad description of the mental state which constitutes actual malice in criminal libel. Wharton's Criminal Law and Procedure (Anderson's Edition), Vol. 2, section 879 (page 745); 33 Am. Jur., Libel and Slander, section 312 (page 249). The last cited authorities used the words "without legal (or lawful) justification or excuse". The definition in these terms is not very helpful because it leads us into a vast field of what constitutes justification or excuse.

A more workable analysis appears in *Smith v. Commonwealth*, 98 Ky. 437, 33 SW 419 (1895). That case involved the question of whether the jury should be instructed to find "malice". The Court held an instruction proper without use of this term when the jury was required to find that the publication was false and libelous and was "written and published by (defendant) solely and *for the purpose* of bringing the (prosecuting witness) into great contempt, scandal, infamy and disgrace". (Our emphasis.)

---

<sup>10</sup> Mens Rea, 45 Harvard Law Review 974.

*Opinion and Order.*

The United States Supreme Court has recently added an additional measure of malice in a criminal libel case where the defamatory words concern public officers and public affairs (which we have in the present case). In *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 2d 125, it was held that the state could not impose criminal sanctions for criticism of official conduct of public officials, even though false, unless the defamatory words were published "with knowledge of their falsity or in reckless disregard of whether they are true or false". This added another dimension to malice, although serious questions arise concerning its practical utility and proper application.<sup>11</sup> There is still an area of inevitable uncertainty in pinpointing the evil intent within the scope of the term.

We may point out that defendant does not contend the element of "malice" is so vague, or uncertain, or inclusive as to make unconstitutional his prosecution or conviction for criminal libel. We have discussed this matter because it has given us some concern and because it is significant on the next contention made by defendant.

It is argued there was no *evidence* offered to show that defendant's defamatory statements were made with "actual malice". That is what *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 95 ALR 2d 1412, 11 L. Ed. 2d 686, and *Garrison v. Louisiana*, ..... U. S. ...., 85 S. Ct. 209, 13 L. Ed. 125, apparently require. However, neither of those cases required *independent* proof of malice. Obviously, unless the defendant had told someone of an evil motive or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual

---

<sup>11</sup> *New York Times Co. v. Sullivan*—The Scope of a Privilege, 51 *Virginia Law Review* 106.

*Opinion and Order.*

malice (i.e., a calculated falsehood), by proof rather than presumption, but they lay down no constitutional standards with respect to the *sufficiency* of proof (although New York Times considered the question of sufficiency).

As we have intimated, if the defendant has not stated his motives to another person or has not taken the stand as a witness (as here), it is a practical impossibility to prove his knowledge, or reckless disregard of the truth, or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct. Malice may be proved by circumstantial evidence as any other fact. *Combs v. Commonwealth, Ky., 356 SW 2d 761.*

In the present case the defendant was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant and the prosecuting witnesses were in opposing camps. From all these facts a jury, not necessarily but reasonably, could conclude that the defendant was motivated by actual malice: that is, he knowingly or in reckless disregard of the truth published these false statements for the purpose of exposing the prosecuting witnesses to public degradation.

It may be noted that the trial judge by his instructions required the jury to find malice in substantially these terms. Actually the instructions were more favorable to the defendant than the law required. The jury was required to find the defamatory matter was "known to be false", even though a reckless disregard of the truth would have carried the same imputation of wrongful conduct. The jury was also required to find that the defamatory matter was published "*solely* and for the purpose of" bringing the complaining witnesses into public degradation. This language was taken from *Smith v. Commonwealth, 98 Ky.*

*Opinion and Order.*

437, 33 SW 419 (1895). It is not only ungrammatical but would seem to excuse the defendant if he could show some collateral purpose influencing his conduct. While we disapprove of the use of the word "solely" in the instruction, its inclusion favored the defendant. On this point we must conclude that the evidence, even though circumstantial, was sufficient to support a jury finding of actual malice.

It is next contended the indictment was fatally defective in that it did not set forth facts sufficient to constitute a criminal offense. The indictment is quoted at the beginning of this opinion. From our discussion of other problems arising in this case, it is apparent this indictment in substance sets forth all of the essential elements of criminal libel. It certainly conforms with the requirements of RCr 6.10(2).

Under RCr 6.22 defendant moved for a bill of particulars, which motion was denied. This was error. At least defendant was entitled to an accurate copy of the alleged libelous matter. Prior to the adoption of our new criminal rules, apparently this would have been an essential part of the indictment. Roberson's New Kentucky Criminal Law and Procedure, 2d Ed., section 1186 (page 1404). However, the denial of this motion was not prejudicial. There is no suggestion defendant was not fully aware that he was being prosecuted for the libelous matter, concerning the specifically named prosecuting witnesses, which appeared in "Notes on a Mountain Strike", or that he did not have a copy of this printed material. Defendant insists he was entitled to know "in what manner it was claimed publication was made" but this is quibbling over a relatively unimportant matter. We cannot find the denial of defendant's motion in any way prejudiced his defense.

The final contention is that the verdict was concurred in by only 10 members of the jury and was void because in violation of RCr 9.82 and RCr 9.88, which require a "unanimous" verdict. It is admitted by defendant that he voluntarily consented to a majority verdict before it was

*Opinion and Order.*

rendered. It is claimed, however, that such consent or waiver violates the "ancient mode of trial by jury" (Section 7, Kentucky Constitution) and public policy.

The only answer of the Commonwealth to this argument, in its brief, is that since the record fails to show otherwise, we must presume the verdict was unanimous. We will assume, however, that only 10 of the 12 jurors agreed upon the verdict. Clearly defendant would have been bound by an agreement to honor the verdict of a 10-man jury. KRS 29.015 specifically authorizes the parties in a misdemeanor case to agree on a trial by a lesser number of persons than 12. The offense with which defendant was charged was a misdemeanor (KRS 431.060).

At first blush it would seem that if a defendant "may agree to a trial by a lesser number of persons" than 12 (KRS 29.015), an agreement to accept a verdict of the majority of a panel of 12 conforms with the statute. It is contended, however, that regardless of the number of jurors, the verdict of that specific number must be *unanimous*, as RCr 9.82(1) and RCr 9.88 provide.

Such view was taken in *Hibdon v. United States*, 204 F. 2d 834, wherein the court followed two lines of reasoning. It was first held that because of the mandatory phrasing of Federal Criminal Rule 31(a), which is substantially the same as RCr 9.82, the requirement of unanimity could not be waived. We are not inclined to accept this conclusion. A vast number of both civil and criminal procedural rules are mandatory in form, but unless they are jurisdictional in nature, or noncompliance will adversely affect the administration of justice, no reason is apparent why a party cannot understandingly and voluntarily waive their requirements.

The second line of approach in *Hibdon* was that under the ancient common law the defendant's guilt had to be proved beyond a reasonable doubt in order to overcome the presumption of innocence, and a verdict of only a majority of the jurors would not meet that requirement

*Opinion and Order.*

since a dissenting vote would demonstrate the existence of a reasonable doubt. It was suggested that unless the court upheld this high standard upon which a conviction could be based, the prosecutor would have a lesser burden of proof and there might result unjust convictions. Assuming these speculations have some validity, the risk is one which the defendant voluntarily accepts.

The substance of the Hibdon opinion relating to the sacredness of a jury trial was keyed to a "humanitarian concept" and "due process". Emphasis was placed upon the historical background and the public interest in the protection of persons accused of crime. In our opinion the reasons making necessary extraordinary solicitation for the defendant's rights have long since disappeared. It will be remembered that under the common law the accused could not testify in his own behalf, he had no right to counsel, and the penalties were extremely severe, usually death. In *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, it was pointed out the ancient doctrine that the accused could waive no rights was based upon those early conditions. Noting that they no longer exist, the United States Supreme Court decided the accused could waive a 12 man jury and properly agree to be tried by 11 jurors.

The Hibdon opinion sought to distinguish the Patton case and to distinguish between waiving the number of jurors and waiving unanimity. Accepting the latter distinction, we simply cannot find a persuasive reason for a different application of the waiver principle. We will take leave of Hibdon with the observation that the ultimate decision was based on an acceptable ground, i.e., the defendant was coerced into the agreement and therefore it was not voluntarily made. The preliminary conclusions in that opinion which we have discussed fall into the category of dictum. This does not condemn the reasoning but we are not inclined to follow it.

*Opinion and Order.*

We think the time has come to abandon the romantic aspects of the ancient mode of trial by jury and consider the matter pragmatically. No one questions the right of a defendant in a criminal case to invoke the protection of any or all of his constitutional rights. On the other hand, we can find no sound reason to deny him the right of waiving procedural requirements which exist principally for his benefit. We have recognized that he can waive a jury completely by pleading guilty. He can waive the right to counsel, the right to freedom from self-incrimination, the right to have excluded evidence obtained by unreasonable search or seizure, and at least in misdemeanor cases, the right to a 12-man jury. On what logical basis is unanimity a more sacred right?

It is true this Court has heretofore adhered to the theory that in a *felony case* the defendant cannot waive a 12-man jury. *Branham v. Commonwealth*, 209 Ky. 734, 274 SW 489; *Tackett v. Commonwealth*, Ky., 320 SW 2d 299. A serious question may be raised as to whether a valid distinction can be made between the waiver of defendant's rights in felony cases on the one hand and misdemeanors on the other. See *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854; *Waiver of Trial Jury in Felony Cases in Kentucky*, 48 Ky. L. Journal 457. We do not have that question here and will not re-examine it.

It is our conviction that at least in misdemeanor cases the defendant may waive not only a 12-man jury but unanimity of the jurors in reaching their verdict, provided always that such waiver agreement is entered into *understandingly* and *voluntarily*, and provided of course the Commonwealth agrees and the trial court approves. Since no suggestion is made that the defendant in this case did not understandingly and voluntarily enter into the agreement to accept a majority verdict (and our solicitude for the rights of the defendant can be maintained by careful scrutiny of these two conditions), he was bound by his agreement. We find no error here.

*Opinion and Order.*

We have considered carefully each of the six points raised in appellant's brief and find no reversible error.

The judgment is affirmed.

Chief Justice Moremen and Judges Stewart and Milliken dissent on the ground that since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.





DEC 2

IN THE

JOHN F. DAVIS

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 619

STEVE ASHTON,

*Petitioner,**against*

COMMONWEALTH OF KENTUCKY

*Respondent.*

---

---

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

---

---

ROBERT MATTHEWS  
ATTORNEY GENERALJOHN B. BROWNING  
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

Copies of the within Brief were  
mailed, postage prepaid, to Hon.  
Ephraim London, attorney for  
petitioner, 1 East 44th Street,  
New York, New York 10017, this  
----- day of -----,  
1965.

---

Assistant Attorney General

## INDEX

|   | PAGE  |
|---|-------|
| STATEMENT -----   | 1-2   |
| ARGUMENT -----  | 2-11  |
| I. The common law crime of criminal libel is not un-<br>constitutionally vague as to its essential elements. Conviction of petitioner of the common law crime<br>was not a violation of due process or the constitu-<br>tional guarantee of freedom of the press -----  | 2-4   |
| II. The instructions of the trial court correctly defined<br>the crime in accordance with the decisions of this<br>court -----  | 4-6   |
| III. There was sufficient evidence to authorize a con-<br>clusion by the jury that the statements about the<br>chief of police and the sheriff were published with<br>actual malice. The conviction of petitioner does not<br>violate his constitutional guarantees merely because<br>the publication related to the official conduct of<br>persons holding public office ----- | 6-8   |
| IV. There was sufficient proof of publication of the<br>libelous matter by petitioner -----   | 8-10  |
| V. The statements about Mrs. Nolan were false in<br>part -----  | 10-11 |
| VI. A conviction and punishment for making false, de-<br>rogatory and malicious statements about the official<br>conduct of public officials does not violate the consti-<br>tutional guarantee of freedom of the press -----   | 11    |
| CONCLUSION -----  | 11-12 |

# TABLE OF CASES

|  | PAGE  |
|--|-------|
| <i>Beauharnais v. Illinois</i> , 343 U. S. 250, 265 -----                              | 3     |
| <i>Browning v. Commonwealth</i> , 116 Ky. 282, 76 S.W. 19<br>(1903) -----              | 3     |
| <i>Cole v. Commonwealth</i> , 222 Ky. 350, 300 S.W. 907 (1927) --                      | 3     |
| <i>Commonwealth v. Duncan</i> , 127 Ky. 47, 104 S.W. 997<br>(1907) -----               | 3     |
| <i>Garrison v. Louisiana</i> , 379 U. S. 64 -----                                      | 6, 10 |
| <i>Near v. Minnesota</i> , 283 U. S. 697 -----   | 3     |
| <i>New York Times Co. v. Sullivan</i> , 376 U. S. 254 -----                            | 6     |
| <i>Smith v. Commonwealth</i> , 98 Ky. 437, 17 K.L.R. 1010, 33<br>S.W. 419 (1895) ----- | 3     |
| <i>Tracy v. Commonwealth</i> , 87 Ky. 578, 9 S.W. 822 (1888) --                        | 3     |
| <i>Winters v. New York</i> , 33 U. S. 507 -----  | 2     |
| <i>Yancey v. Commonwealth</i> , 135 Ky. 207, 122 S.W. 123<br>(1909) -----              | 3     |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

No. 619

STEVE ASHTON,

Petitioner,

*against*

COMMONWEALTH OF KENTUCKY

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI TO THE COURT OF APPEALS  
OF THE COMMONWEALTH OF KENTUCKY**

**STATEMENT**

The Commonwealth of Kentucky contends that certiorari should be denied in the present case because there are no substantial questions presented. The Commonwealth specifically contends:

1. Petitioner's conviction in Kentucky of the common law crime of criminal libel was not a violation of due process or the constitutional guarantee of freedom of the press since the basic elements of the crime have been sufficiently defined and there was no uncertainty as to the nature of the prohibited conduct.
2. Petitioner was not denied due process nor was his constitutional right of communication infringed by the instructions given by the trial court, since such instructions sufficiently defined the crime in accordance with recent decisions of this Court.

3. There was sufficient evidence introduced to show actual malice in the making of the false statements in that the style and tone of the writing and the circumstances surrounding its publication established that it was made with a reckless disregard of the truth.

4. There was sufficient proof that petitioner published the libel.

5. The statements made about the co-owner and co-publisher of the newspaper were false in part and constituted a libel.

6. Petitioner's constitutional rights were not violated merely because the conviction was for making malicious, false and derogatory statements about the official conduct of public officials.

## ARGUMENT

### I.

**The common law crime of criminal libel is not unconstitutionally vague as to its essential elements. Conviction of petitioner of the common law crime was not a violation of due process or the constitutional guarantee of freedom of the press.**

Admittedly, if a penal law is so vague that it fails to give fair warning of the conduct that will be held criminal, it violates the requirements of Due Process and in the case of publications constitutes a denial of freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution. *Winters v. New York*, 333 U. S. 507. The Kentucky Court of Appeals assumed for the purpose of its decision that the same certainty required of a criminal statute applies to a common law crime.

The state appellate court pointed out that the crime of criminal libel is recognized and enforced today throughout the

United States, and the courts of those states which have not legislated on the subject have acknowledged the existence of the crime in its common law form. *Beauharnais v. Illinois*, 343 U. S. 250, 265. The existence of the common law crime and the validity of punishment thereunder for certain publications was noted by Mr. Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697 at 715:

"... But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the *common law rules* that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. The law of criminal libel rests upon that secure foundation." (Emphasis added.)

In the six Kentucky cases dealing with the common law crime of criminal libel, *Tracy v. Commonwealth*, 87 Ky. 578, 9 S.W. 822 (1888); *Smith v. Commonwealth*, 98 Ky. 437, 17 K.L.R. 1010, 33 S.W. 419 (1895); *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903); *Commonwealth v. Duncan*, 127 Ky. 47, 104 S.W. 997 (1907); *Yancey v. Commonwealth*, 135 Ky. 207, 122 S.W. 123 (1909), and *Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927), the crime was in essence defined as consisting of four basic elements: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice. As the Court of Appeals stated in its opinion:

"As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice. There is no uncertainty in the law about what constitutes (1) publication, (2) defamatory words, or (3) falsity. There is a certain indefiniteness concerning the nature of malice but we find this difficulty with that term throughout the criminal law . . . We may point out that defendant does not contend the element of 'malice' is so vague, or uncer-

tain, or inclusive as to make unconstitutional his prosecution or conviction for criminal libel."

The four basic elements necessary to constitute the common law crime of criminal libel were emphasized in all the Kentucky cases heretofore decided. It cannot be said that petitioner's conviction of the common law crime is unconstitutional because the crime was so vaguely defined that persons charged with a violation could have had no reasonable notice of what acts were punishable and no comprehension of the nature of the conduct condemned before imposition of punishment.

## II.

The instructions of the trial court correctly defined the crime in accordance with the decisions of this court.

The trial court properly required the jury to find that the Commonwealth had established the four basic elements of the offense, namely, publication, defamatory material, falsity and malice. As stated in the opinion of the Court of Appeals:

"By instructions to the jury the trial court made a most commendable effort to identify the crime more fully than was done in the indictment. To convict, the jury was required to find the defendant 'did unlawfully publish \* \* \* certain libelous and defamatory matter' which was 'false and libelous, and was so *known to be false and libelous* when published by the defendant, and was written and published by him *solely and for the purpose of bringing* (the complaining witnesses) into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation (of the complaining witnesses) \* \* \*'" (Emphasis added.)

The Court of Appeals went on to say:

"... Actually the instructions were more favorable to the defendant than the law required. The jury was

required to find the defamatory matter was 'known to be false', even though a reckless disregard of the truth would have carried the same imputation of wrongful conduct. The jury was also required to find that the defamatory matter was published '*solely* and for the purpose of' bringing the complaining witnesses into public degradation . . . While we disapprove of the use of the word '*solely*' in the instruction, its inclusion favored the defendant."

Petitioner contends that the offense of criminal libel as defined by the trial court in its instructions infringed his constitutional rights because it defined the crime in terms of its tendency to cause a "breach of the peace" or lead to an indictable act, which is too indefinite to identify criminal conduct.

As the opinion of the lower court points out, in the development of the common law of criminal libel in the United States, the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a "breach of the peace" or to induce others to commit a public offense. The reference in the court's instructions to the tendency of the material to cause a breach of the peace is obsolete and unessential language which refers only to the *nature of the writing* which would constitute the basis for criminal libel. None of the previous Kentucky cases dealing with the crime based the criminality of the act upon the tendency to cause a "breach of the peace." As stated by the Court of Appeals:

"None of our Kentucky cases based the criminality of the act upon the tendency to cause a 'breach of the peace' or the commission of an 'indictable offense'. To the extent they defined the defamatory nature of the words in these terms, they are obsolete. In our latest case on the subject, *Cole v. Commonwealth*, 22 Ky. 350, 300 S.W. 907 (1927), which perhaps came closer to defining the crime than any of our other opinions, no mention is made of the possibility of public disturbance which might be incited by the publication.

"We conclude, therefore, that defendant cannot fairly claim that an outmoded aspect of the impact of the defamatory words made uncertain the kind of conduct for which he was prosecuted and convicted."

It is submitted that the possible uncertainty of the outmoded and superfluous concepts of "breach of the peace" or "indictable offense", as descriptive of the nature of the defamatory matter, does not unstabilize the essential elements of the offense with which defendant was charged, and the trial court in its instructions correctly set out all of the four basic elements.

### III.

There was sufficient evidence to authorize a conclusion by the jury that the statements about the chief of police and the sheriff were published with actual malice. The conviction of petitioner does not violate his constitutional guarantees merely because the publication related to the official conduct of persons holding public office.

It is sufficient to convict a person of criminal libel to show that the publication was made with actual malice in that the false statement was made with "reckless disregard of the truth." *Garrison v. Louisiana*, 379 U. S. 64. The *Garrison* case as well as *New York Times Co. v. Sullivan*, 376 U. S. 254 does not require any independent proof of actual malice. To do so would require the impossible, as stated in the opinion of the Court of Appeals:

"... Obviously, unless the defendant had told someone of an evil motive or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual malice (i.e., a calculated

falsehood), by proof rather than presumption, but they lay down no constitutional standards with respect to the *sufficiency* of proof (although New York Times considered the question of sufficiency).

"As we have intimated, if the defendant has not stated his motives to another person or has not taken the stand as a witness (as here), it is a practical impossibility to prove his knowledge, or reckless disregard of the truth, or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct. Malice may be proved by circumstantial evidence as any other fact. *Combs v. Commonwealth, Ky., 356 S.W. 2d 761.*"

In the present case "Notes on a Mountain Strike" was clearly not any attempt at fair criticism of the conduct of the officials but was an attack upon them for the purpose of vilifying them and causing members of the public previously disposed to be neutral to choose sides and take the side of the strikers against the operators and the police for what was ominously referred to as the coming "show-down." Petitioner did not know the sheriff or police chief or newspaper publisher and made no effort to talk to them or ask their comments regarding the malicious rumors being spread about them by the strikers which he planned to strengthen by publication. Petitioner made no attempt to verify the truth of these stories even though on their face they cautioned inquiry. Although not himself acquainted with the region or its inhabitants or the specific targets of his abuse, petitioner did not hesitate to publish the worst allegations that he heard about the local law enforcement officials.

The plain fact is that petitioner published his pamphlet with a "reckless disregard of the truth" and did not care whether the statements contained therein were true or false. The style and tone of the pamphlet and the circumstances surrounding its publication clearly evidenced that petitioner was only interested in maligning the peace officers in order to sway the public toward

support of the striking miners among whom petitioner was living and with whom he associated.

The circumstances were sufficient to warrant the jury in concluding that the statements about the chief of police and the sheriff were published with actual malice.

#### IV.

**There was sufficient proof of publication of the libelous matter by petitioner.**

"Notes on a Mountain Strike" was a mimeographed publication bearing the date of March 22, 1963 with petitioner's name and address printed in ink on the back. City Policeman C. W. Begley testified that on the night of March 26, 1963 he and another officer were making a routine inspection of beer taverns when they entered Stacy's Tavern and saw petitioner and four or five others grouped around a table which had some pamphlets on it. Sergeant Cook who was with Begley saw the pamphlets and asked petitioner what they were with the reply being "reading material." Petitioner then asked Begley if he wanted one and when he said yes petitioner got a copy out from under the table and handed it to the officer and told him to take it home and read it. (E. 151, 152). Begley stated that petitioner "was free to give them to us. Wanted us to take one and read it." (E. 152, Q. 12).

The officers returned to the police station after their evening inspection of taverns and when Chief Luttrell came on duty the following morning he was shown a copy of the pamphlet which induced him to send Patrolman Anderson Asher to Stacy's Tavern to see if additional copies could be obtained. Officer Asher stated that when he went into the tavern on the morning of March 27 petitioner was present and upon inquiry reached under the table and got a copy of the pamphlet and gave it to him. (E. 160). Asher stated that the pamphlet was given to

him voluntarily by petitioner when he asked "Do you care if I have one?" (E. 162, Q. 10).

The evidence is sufficient to establish that petitioner was sitting at a table in a public tavern stapling together copies of "Notes on a Mountain Strike" and distributing prepared copies to anyone who came into the tavern and expressed curiosity as to what the pamphlets might be about. The evidence shows that petitioner voluntarily gave copies of the pamphlet to the officers and urged them to take them home and read them. There can be no question about there being sufficient evidence of publication.

#### V.

**The statements about Mrs. Nolan were false in part.**

"Notes on a Mountain Strike" published by petitioner falsely alleged that Mrs. W. P. Nolan, co-owner and publisher of the Hazard Herald, and her newspaper had received as a result of a nationwide television show over \$14,000 cash, as well as food and clothing which "was supposed to be sent to the pickets", but that Mrs. Nolan because of her opposition to labor saw to it that the pickets received only a small fraction of the money and food and gave the rest of it to the "scabs." As a matter of fact, the food and articles received by the newspaper were not earmarked to be used exclusively for the pickets or even the miners in general but were to be distributed to any and all "needy persons". (E. 122, Q. 14). Mrs. Nolan stated these items were not sent as a result of a TV show devoted exclusively to the plight of the striking miners, but came in as a result of another TV presentation. The contributions were divided between seven counties at the request of the Governor and distributions were made by committees on the basis of need. (E. 114, 116). Practically all of the money and material was duly distributed. (E. 120).

The moderating influence of the voice of the newspaper was sought to be diminished by attacking its publisher as a person who could not be trusted or relied upon since she had already violated a public trust by refusing because of prejudice against labor to give the striking miners the money and food which was contributed to the newspaper for their particular benefit. Petitioner did not attempt to ascertain the whole truth by inquiring into the facts of the matter and published the statements with a reckless disregard of whether they were entirely true or not.

## VI.

**A conviction and punishment for making false, derogatory and malicious statements about the official conduct of public officials does not violate the constitutional guarantee of freedom of the press.**

This Court held in *Garrison v. Louisiana*, 379 U. S. 64 that where false and derogatory statements were made about public officials with a "reckless disregard of the truth" a conviction for criminal libel would not be in violation of the constitutional guarantee of freedom of the press. This holding should not be set aside.

**CONCLUSION**

The questions presented in the petition are not substantial. The Kentucky Court of Appeals did not erroneously interpret the law and the trial court properly applied it. Certiorari should be denied.

Respectfully submitted,

ROBERT MATTHEWS  
ATTORNEY GENERAL

BY

JOHN B. BROWNING  
ASSISTANT ATTORNEY GENERAL  
COUNSEL FOR RESPONDENT



FILED

MAR 14 1966

IN THE

JOHN F. DAVIS, CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1965

No. 619

---

STEVE ASHTON,

*Petitioner,*

—against—

COMMONWEALTH OF KENTUCKY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE COMMONWEALTH OF KENTUCKY

---

---

**BRIEF FOR THE PETITIONER**

---

---

EPHRAIM LONDON,  
1 East 44th Street,  
New York, N. Y. 10017

DAN JACK COMBS,  
Pikeville, Kentucky  
*Attorneys for Petitioner*

*On the brief:*

EPHRAIM LONDON  
HELEN L. BUTTENWIESER  
MELVIN L. WULF

---

---



## INDEX

|   | PAGE |
|---|------|
| Opinions Below .....                                      | 1    |
| Statement of the Grounds of Jurisdiction .....            | 2    |
| The Constitutional Provisions and Statutes Involved ..... | 2    |
| The Questions Presented for Review .....                  | 4    |
| Statement of the Case .....                               | 6    |
| Summary of Argument .....                                 | 12   |

### ARGUMENT:

#### Point I

Ashton's conviction of common-law criminal libel was a violation of the constitutional guarantees of due process and of freedom of the press because of the vagueness and breadth of the law, and because <sup>THE LAW</sup> it provided for punishment of communications that do not present <sup>ANY</sup> danger to the State or <sup>TO</sup> the public welfare ..... 15

A. The Kentucky common-law of criminal libel as it was declared in earlier cases and by the Kentucky Court of Appeals in this case, is unconstitutionally vague, and violates the constitutional guarantee of freedom of the press in punishing expression that does not present a serious and imminent danger to the community 16

|   |    |
|---|----|
| B. The definition of the offense of criminal libel in the Trial Judge's charge to the jury in this case was unconstitutionally vague, and it violated the requirements of Due Process in attributing guilt to a writer because his readers' reaction might be violent ..... | 23 |
|---|----|

Point II

|  |    |
|--|----|
| The criminal libel law as <sup>IT WAS CONSTRUED</sup> <del>applied</del> by the trial court, was unconstitutional. The affirmance of Ashton's conviction under a narrower interpretation of the law in conflict with that given in the trial court's charge to the jury, was a denial of due process and of equal protection of the laws ..... | 31 |
|--|----|

Point III

|  |    |
|--|----|
| Ashton's conviction of criminal libel violated the constitutional guarantee of freedom of the press because the statements made about the complaining witness, Mrs. Nolan, were true ..... | 37 |
|--|----|

Point IV

|  |    |
|--|----|
| The State failed to produce any evidence that the statements about the official conduct of the Chief of Police and the High Sheriff were made with malice. Ashton's conviction therefore violated the constitutional guarantee of freedom of the press.... | 43 |
|--|----|

## Point V

|  |    |
|--|----|
| The alleged libel was not communicated to the public, and it was not published voluntarily or maliciously. Ashton's conviction was therefore without due process and violated the constitutional guarantee of freedom of the press ..... | 47 |
|--|----|

## Point VI

|   |    |
|---|----|
| Imposing punishment for inaccurate and derogatory statements about the official conduct of public officers violates the constitutional guarantees of freedom of the press ..... | 51 |
|---|----|

|                  |    |
|------------------|----|
| CONCLUSION ..... | 52 |
|------------------|----|

## TABLE OF CASES AND OTHER AUTHORITIES

*Cases:*

|   |                |
|---|----------------|
| Bagette v. Bullitt, 377 U. S. 360 .....                   | 16             |
| Bailey v. Alabama, 219 U. S. 219 .....                    | 33             |
| Beauharnais v. Illinois, 343 U. S. 250 .....              | 29, 30         |
| Bridges v. California, 314 U. S. 252 .....                | 17, 22         |
| Browning v. Commonwealth, 116 Ky. 282 .....               | 19, 20, 31     |
| Cantwell v. Connecticut, 310 U. S. 296 .....              | 17, 24, 42     |
| Cochran v. Kansas, 316 U. S. 255 .....                    | 34             |
| Cole v. Arkansas, 333 U. S. 196 .....                     | 35             |
| Cole v. Arkansas, 338 U. S. 345 .....                     | 35             |
| Cole v. Commonwealth, 222 Ky. 350 .....                   | 19, 20-21, 32  |
| Coleman v. McLennan, 78 Kan. 711 .....                    | 46             |
| Commercial Pictures Corp. v. Regents, 346 U. S. 587 ..... | 30             |
| Commonwealth v. Duncan, 127 Ky. 47 .....                  | 19, 20, 31, 32 |

|  | PAGE       |
|--|------------|
| Connally v. General Construction Co., 269 U. S. 385 ....         | 36         |
| Cox v. Louisiana, 379 U. S. 536 .....                            | 15, 26     |
| Cramp v. Board of Public Instruction, 368 U. S. 278 ....         | 15         |
| Eby v. Wilson, 289 S. W. 639 .....                               | 21         |
| Edwards v. South Carolina, 372 U. S. 229 .....                   | 26         |
| England v. Louisiana, 375 U. S. 411 .....                        | 36         |
| Ernde v. San Joaquin County, 23 Cal. 2d 146 .....                | 42         |
| Fort Worth Press v. Davis, 96 S. W. 2d 416 (Tex.) ....           | 42         |
| Frank v. Magnum, 237 U. S. 309 .....                             | 34         |
| Garner v. Louisiana, 368 U. S. 157 .....                         | 25         |
| Garrison v. Louisiana, 379 U. S. 64 .....23, 26, 27, 29, 37, 38, |            |
| 44, 45, 46, 47, 50, 51   |            |
| Giaceio v. Pennsylvania, — U. S. — .....                         | 15         |
| Griffin v. Illinois, 351 U. S. 12 .....                          | 34         |
| Hague v. C. I. O., 307 U. S. 496 .....                           | 27         |
| Henry v. Rock Hill, 376 U. S. 776 .....                          | 26         |
| Herndon v. Lowry, 301 U. S. 242 .....                            | 16, 17, 21 |
| Holmby Productions, Inc. v. Vaughn, 350 U. S. 870 ....           | 30         |
| James v. United States, 366 U. S. 213 .....                      | 36         |
| Jordan v. De George, 341 U. S. 223 .....                         | 15         |
| Kingsley International Pictures Corp. v. Regents, 360            |            |
| U. S. 684 .....  | 30         |
| Kunz v. New York, 340 U. S. 290 .....                            | 27         |
| Linkletter v. Walker, 381 U. S. 618 .....                        | 36         |

|  | PAGE                                     |
|--|--|
| Metzger v. Washington Post Co., 40 App. D. C. 565 ....                 | 21                                       |
| Moity v. Louisiana, 379 U. S. 201 .....                                | 47                                       |
| Musser v. Utah, 333 U. S. 95 .....                                     | 15, 30                                   |
| Near v. Minnesota, 283 U. S. 697 .....                                 | 28, 42                                   |
| New York Times Co. v. Sullivan, 376 U. S. 254 .....                    | 22, 38, 41,<br>43, 44, 45,<br>47, 50, 51 |
| Pennekamp v. Florida, 328 U. S. 331 .....                              | 22                                       |
| Pierce v. United States, 314 U. S. 306 .....                           | 17                                       |
| Provident Sav. Life Assur. Soc. v. Johnson, 115 Ky.<br>84 (1903) ..... | 18, 31                                   |
| Riley v. Lee, 88 Ky. 603 .....   | 19                                       |
| Shields v. Brooks, 238 Ky. 678 .....                                   | 21                                       |
| Shuttlesworth v. City of Birmingham, 382 U. S. 87 .....                | 15, 33,<br>34, 36                        |
| Smith v. Byrd, 225 Miss. 331 .....                                     | 42                                       |
| Smith v. California, 361 U. S. 147 .....                               | 16                                       |
| Smith v. Commonwealth, 98 Ky. 437 .....                                | 19                                       |
| Speiser v. Randall, 375 U. S. 513 .....                                | 16                                       |
| State v. Haffer, 94 Wash. 136 .....                                    | 21                                       |
| Stromberg v. People of the State of California, 283<br>U. S. 359 ..... | 16                                       |
| Sweeney & Co. v. Brown, 60 S. W. 2d 381 .....                          | 20                                       |
| Tehan v. Shott, — U. S. — (decided January 19,<br>1966) .....          | 36                                       |
| Terminiello v. Chicago, 337 U. S. 1 .....                              | 22, 27, 28                               |
| Thomas v. Collins, 328 U. S. 331 .....                                 | 22, 36                                   |

|   | PAGE              |
|---|-------------------|
| Thompson v. Adelberg & Berman, 186 Ky. 487 .....                            | 21                |
| Thornhill v. Alabama, 310 U. S. 88 .....                                    | 16, 26            |
| Tracy v. Commonwealth, 87 Ky. 578 .....                                     | 18, 31            |
| Walston v. Commonwealth, 32 Ky. L. Rep. 535 .....                           | 32                |
| Williams v. North Carolina, 317 U. S. 287 .....                             | 42                |
| Williams v. Riddle, 145 Ky. 459 .....                                       | 21                |
| Winters v. New York, 333 U. S. 507 .....                                    | 16, 25            |
| Wood v. Georgia, 370 U. S. 375 .....  | 38, 41            |
| Yancey v. Commonwealth, 135 Ky. 207 .....                                   | 19                |
| Yates v. United States, 354 U. S. 298 .....                                 | 29                |
| <i>Statutes:</i>  |                   |
| Constitution of the United States:  |                   |
| First Amendment .....   | 2, 16, 22, 43, 53 |
| Fifth Amendment .....   | 15                |
| Fourteenth Amendment .....  | 2, 15, 16, 22     |
| 28 U. S. C. 1257(3) .....   | 2                 |
| Constitution of the Commonwealth of Kentucky, Section 9 .....               | 3, 16             |
| Kentucky Revised Statutes, Chapter 431, Section 431.075 .....               | 3                 |
| Kentucky Code of Criminal Procedure, Title IX, Article 2, Section 347 ..... | 4, 34             |

|   | PAGE       |
|---|------------|
| <i>Other Authorities:</i>   |            |
| Brant, <i>Seditious Libel: Myth and Reality</i> , 39 N. Y. U. L. R. 1 .....                     | 26         |
| Chafee, <i>Free Speech in the United States</i> (1941) .....                                    | 27         |
| Coke, <i>The Case de Libellis Famosis or of Scandalous Libels</i> , 3 Coke 254 (1826 ed.) ..... | 26         |
| <i>Common-law Crimes in the United States</i> , 47 Col. L. R. 1332 .....                        | 17         |
| <i>Constitutionality of the Law of Criminal Libel</i> , 52 Col. L. R. 521 .....                 | 26, 42, 44 |
| <i>Due Process Requirements of Definiteness in the Statutes</i> , 62 Harv. L. R. 77 .....       | 15         |
| Emerson, <i>Toward a General Theory of the First Amendment</i> , 72 Yale L. J. 877 .....        | 51         |
| Keely, <i>Criminal Libel and Free Speech</i> , 6 Kan. L. R. 295 (1958) .....                    | 44         |
| Lovell, <i>The Reception of Defamation By the Common Law</i> , 15 Vand. L. R. 1051 .....        | 26         |
| Mill, <i>On Liberty</i> , Chapter 2 (MacMillan) .....   | 28         |
| Model Penal Code of the American Law Institute .....  | 23         |
| Roberson's New Kentucky Criminal Law & Procedure, §1177 (2d ed., 1927) .....                    | 48         |
| <i>The Void for Vagueness Doctrine in the Supreme Court</i> , 109 U. of Pa. L. R. 67 .....      | 16         |



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

No. 619

---

STEVE ASHTON,

*Petitioner,*

—against—

COMMONWEALTH OF KENTUCKY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE COMMONWEALTH OF KENTUCKY

---

**BRIEF FOR THE PETITIONER**

---

**Opinions Below**

Petitioner was found guilty after a trial by jury in the Perry Circuit Court of Kentucky (R. 8). The Trial Court did not file an opinion when the judgment of conviction was entered.

The judgment of conviction was affirmed by the Court of Appeals of Kentucky. The opinion of the majority (R. 144-158) and the dissenting opinion (R. 158) have not been officially reported.

## **Statement of the Grounds of Jurisdiction**

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

The judgment of the Court of Appeals of the Commonwealth of Kentucky sought to be reviewed, was entered June 18, 1965. The time for filing a Petition for Writ of Certiorari was extended to October 16, 1965, by an order made by Mr. Justice Stewart (R. 159). The Petition for a Writ of Certiorari was filed September 27, 1965. The order allowing certiorari was granted January 17, 1966 (R. 160).

## **The Constitutional Provisions and Statutes Involved**

The Constitution of the United States,

First Amendment:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Fourteenth Amendment:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The constitutional provisions of the Commonwealth of Kentucky and the Statutes that are involved are:

The Constitution of the Commonwealth of Kentucky.

"§9. *Truth May Be Given In Evidence In Prosecution for Publishing Matters Proper for Public Information; Jury to try Law and Facts in Libel Prosecutions.* In prosecution for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the Court as in other cases."

Kentucky Revised Statutes, Vol. I, Constitution,  
p. 2, Legislative Research Commission (1960).

Kentucky Statutes

Chapter 431, Crimes and Punishment.

"§431.075. *Common Law Offenses, Penalties for.* Any person convicted of a common-law offense, the penalty for which is not otherwise provided by statute shall be imprisoned in the County jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both."

Kentucky Revised Statutes, Vol. III, Chapter 431,  
p. 2, Legislative Research Commission (1960).

Kentucky Code of Criminal Procedure  
Title IX Appeals; Article 2. Misdemeanors

§347 *Jurisdiction in Misdemeanors*

"That a defendant against whom a judgment has been rendered in the Circuit Court in all penal actions and prosecutions for misdemeanors in which a judgment was for a fine for as much as fifty dollars, or for imprisonment exceeding thirty days shall have the right to have such judgment reviewed by the Court of Appeals; and the Commonwealth shall have the same right \* \* \*"

Kentucky Revised Statutes, Vol. III, Criminal Code, p. 61, Legislative Research Commission (1960).

**The Questions Presented for Review**

(1) Whether the common-law crime of criminal libel, of which Petitioner was convicted in Kentucky, was unconstitutionally vague as it was interpreted at the time of Petitioner's trial, and as it was interpreted, by the Court of Appeals of the Commonwealth of Kentucky on Petitioner's appeal to that court.

(2) Whether the Kentucky common law of criminal libel violates the constitutional guarantee of freedom of the press in punishing as a crime, personal defamation that does not affect the community in any significant way.

(3) Whether Petitioner was denied due process by the Trial Court's instruction to the jury that Petitioner was on trial for the crime of issuing a derogatory statement that might cause a breach of the peace, thus attributing

guilt to Petitioner if the jury found that others might be stirred to unlawful violence by his writing.

(4) Whether the affirmance of Petitioner's conviction by the Kentucky Court of Appeals under a definition of the crime of criminal libel, different from, and in conflict with, the definition applied by the Trial Court, constituted a denial of due process and of equal protection of the laws, and of Petitioner's right to a hearing, on appeal, on the question of the constitutionality of the law as it was applied in his case.

(5) Whether Petitioner was deprived of due process and denied his constitutional right of expression, by his conviction of criminal libel following a general verdict, when it was shown that one of the statements said to be libellous, was in fact true.

(6) Whether convicting Petitioner of having libelled public officials in respect to the performance of their official duties, without proof that Petitioner was motivated by ill will, and without proof that Petitioner was aware of the falsity of the statements attributed to him, was a denial of due process and a violation of Petitioner's right to freedom of the press.

(7) Whether evidence that Petitioner failed to ask the government officials who had been allegedly defamed, if the statements about them were true, established malice sufficiently "to remove the constitutional shield from criticism of official conduct".

(8) Whether convicting Petitioner of criminal libel without proof that he published the libel voluntarily or with malice, or in a manner likely to affect the public, violated the constitutional guarantee of freedom of the press.

(9) Whether a conviction and punishment of a person for making inaccurate and derogatory statements about the official conduct of public officials violates the First and Fourteenth Amendment guarantees of freedom of the press.

### Statement of the Case

Petitioner seeks to review a judgment of the Court of Appeals of Kentucky affirming his conviction of the common-law crime of libel.

*The following, with minor changes, is the statement of the facts to the Court below, to which the attorney for the Commonwealth of Kentucky agreed.*

The Petitioner, Steve Ashton, was indicted for publishing on March 22, 1963, "a false and malicious publication" tending to "degrade or injure Sam L. Luttrell, Charles E. Combs and Mrs. W. P. Nolan."<sup>1</sup> At the time of the alleged libel, Sam L. Luttrell was Chief of Police of Hazard, Kentucky (R. 19), Charles E. Combs was Sheriff of Perry County (R. 70) and Mrs. Nolan was co-owner and co-publisher of a newspaper, the Hazard Herald (R. 48). The alleged libel appeared in a mimeographed pamphlet entitled "Notes on a Mountain Strike" (Commonwealth Exhibit 1, R. 127).

Ashton was 20 years old at the time of the alleged offense (R. 101). He had been a student at Oberlin College in Ohio for two and a half years, and left college in February 1963 to come to Hazard, Kentucky (R. 101). There was at the time, a bitter labor dispute in that area between

---

<sup>1</sup> An indictment charging Ashton with criminally libelling Mr. Nolan was dismissed (R. 2, 16, 122-126).

union and non-union miners (R. 154) and Ashton came in response to an appeal for food, clothing and help for unemployed miners (R. 104). The appeal was made on a program telecast over a national television network: (R. 104).

Ashton was charged with having made the following defamatory statements about Police Chief Luttrell in the pamphlet "Notes on a Mountain Strike":

"Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took five pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. It's against the law for a peace officer to take private jobs'" (R. 122).

A number of the statements were true. It was shown that people known to Chief Luttrell had considered killing a police officer who sympathized with the striking miners. Kilburn, the officer in question, testified that he had been a Police Lieutenant on the Hazard force, working under Luttrell (R. 109). He said that Chief Luttrell told him that he (Kilburn) would be killed by two men, one a policeman, unless he resigned (i.e., "made a move") (R. 109). On direct examination Luttrell denied that he told Kilburn he would be killed "if he didn't make a move" (R. 120) but when cross-examined by the Court, Luttrell admitted that he told Kilburn that his life might be in danger because of statements he had made (R. 121).

Luttrell suggested that he was libeled by the statement that one night five pickets were needed to guard a policeman. Luttrell testified, in response to a question, that there was no truth whatever to a statement that it took "three (sic) men to guard this one city policeman" (R. 29). Thereafter he said he didn't know anything about it (R. 45). However, Charles Moore, a member of the Miners' Relief Committee, testified that he and other pickets had in fact guarded Kilburn's home one night (R. 116).

Luttrell denied, and the defense did not prove that Luttrell had an outside job guarding a mine operator's home (R. 29).

The Trial Court instructed the jury that the defamatory statements made by Petitioner about Sheriff Combs were:

"The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of

the State Police. They escort the scabs into the mines and hold the pickets at gunpoint' " (R. 122-123).

Sheriff Combs conceded the truth of many of the statements. He admitted that he was a mine operator, while acting as High Sheriff (R. 71, 75) and that he and the State police escorted miners through the picket lines (R. 75). He admitted that a boy was beaten and gassed, while in jail in his (the Sheriff's) custody, and that the boy recovered a judgment against him for \$5,000, because of the beating (though he denied that he was present at the time the boy was injured and the tear gas was used) (R. 78, 72). The Sheriff also admitted that he was under indictment for manslaughter, as stated in the Notes (R. 78) and that he had not been removed from office (R. 72).

Sheriff Combs also said that he never had as many as 72 deputies, and that he did not hire deputies "exactly" because they wanted to carry guns. (He said *he* wanted them to carry guns) (R. 71). The Sheriff admitted, however, to having about 48 deputies "on the books", none of whom were unemployed miners (R. 77, 76). The record does not reveal why an issue was made with respect to the number of persons officially and unofficially deputized by the Sheriff, for it was conceded that it had been the practice, "if somebody wants to be a deputy sheriff, why, they kind of put 'em on" (R. 34).

The Sheriff denied, and the defense did not prove, that \$75,000 was offered in settlement of the charges against the Sheriff, and that he "probably bought off" the jury (R. 72).

The Petitioner was also charged with having made the following defamatory statement about Mrs. Nolan:

"The town newspaper, the Hazard Herald, has hol-  
lered that "the commies have come to the mountains of  
Kentucky" and are leading the strike. The Herald was  
the recipient of over \$14,000 cash and several truck-  
loads of food and clothing which were sent as the  
result of a CBS-TV show just before Christmas. The  
story was on the strike and aid was supposed to be  
sent to the pickets in care of the Hazard Herald, how-  
ever, the editor, Mrs. W. P. Nolan, is vehemently  
against labor—she has said that she would rather give  
the incoming aid to the merchants in town than to the  
miners. Apparently that is what she has done, for only  
\$1,100 of the money has come to the pickets, and none  
of the food and clothes. They are now either still under  
lock and key, or have been given out to the scabs and  
others still" (R. 123).

Mrs. Nolan admitted that her newspaper, The Hazard  
Herald, reported that the miners' strike was fomented by  
Communists and that her paper published the quoted state-  
ment (R. 55). She admitted that the Hazard Herald re-  
ceived, not \$14,000 but about \$20,000, and some food and  
clothing, as a result of a televised program about unem-  
ployed miners (R. 56); and that only \$1,100 of the money  
was paid to the pickets (R. 65). She said that she did not  
know whether the money, food and clothing received by the  
Hazard Herald had been distributed to scabs (R. 52).

The charges against Ashton came on for trial before the  
Perry Circuit Court of the Commonwealth of Kentucky  
on September 10, 1963. The jury was unable to reach a  
verdict and the case was continued (R. 7-8). The case was  
reached again for trial on November 21, 1963. There was  
no evidence at the second trial that the pamphlet "Notes

on a Mountain Strike" (in which the alleged libels were printed) was distributed by the Petitioner Ashton or by any other person. A number of copies were found by the police in a room in a tavern and all were seized by the police (R. 26). Ashton was in the room when the pamphlets were found and taken (R. 26). Mrs. Nolan said she *believed* her husband found a copy of the Notes in her door, but did not know who placed it there (R. 53). She was unable to state when the pamphlet was found because, as she put it, "We had gotten so used to it" (i.e. to such communications) (R. 53).

There was also testimony that 50 or 60 copies of the Notes on a Mountain Strike were "prepared to be mailed" when they were taken by the police (R. 28). The Police Chief, Luttrell, admitted, however, that he did not know of anyone who received a copy of the paper other than the complaining witnesses and the police who were sent to pick up the copies (R. 40-41).

Before the jury retired after the second trial, the Court advised the jury "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable" (R. 125). The jury returned a verdict of guilty, concurred in by 10 of its 12 members,<sup>2</sup> and fixed Ashton's punishment at six months in jail and a \$3,000 fine (R. 144, 9). A judgment in conformity with the verdict was recorded in the Court's Book of Criminal Trials on November 21, 1963 (R. 8-9). The judgment of conviction

<sup>2</sup> The trial minutes did not show the number of jurors who agreed upon the verdict. The Attorney General for the Commonwealth stipulated, on the argument of the appeal, that only 10 of the jurors had in fact concurred in the verdict of guilty.

was affirmed by the Court of Appeals of Kentucky on June 18, 1965 (R. 158).

### Summary of Argument

I. The Petitioner Ashton was convicted of conduct made criminal by the common-law of Kentucky. The elements of the crime had been discussed in only six reported opinions before Ashton was indicted, and the definitions of the crime varied in each of the opinions. None of the definitions of the crime in the reported cases is clear or comprehensive, or has the definiteness and clarity that the Constitution requires of a penal law.

The common-law crime of libel was defined in the Trial Judge's instructions to the jury as a writing "calculated to create disturbances of the peace". The Trial Court's definition is based on the ancient notion that a person insulted will resort to arms or violence to vindicate his honor. The premise of the law is no longer tenable and it attributes guilt to an accused because another person may use violence against him. The Trial Court's definition also violates the requirements of due process because of its vagueness.

The common-law crime of libel as it was redefined in this case by the Kentucky Court of Appeals makes all *per se* libel criminal, if uttered maliciously. Under that definition personal calumny that does not in any way affect the public interest may be punished as a criminal offense. That interpretation of the law offends the constitutional guarantee of freedom of the press, which prohibits the punishment of any communication that does not present a clear, imminent and serious danger to the public welfare.

II. The Kentucky Court of Appeals, in affirming Ashton's conviction, acknowledged that the concept of criminal libel as defamatory writing that tends to create a breach of the peace, is obsolete and unconstitutional. In an attempt to cure the constitutional infirmity of the law as it was interpreted when Ashton was convicted, the Court of Appeals, in its opinion affirming Ashton's conviction, modified the definition of the crime. An appellate court may change a law by reinterpreting it but it may not, in a case on review, give retroactive effect to the change where that will work an injustice to the appellant. The affirming of Ashton's conviction under a changed concept of the law was a denial of due process because it in effect sanctioned Ashton's imprisonment under an unconstitutional law, and denied him his right of appeal with respect to the validity of the law as it was understood and applied by those who convicted him.

III. Ashton was accused of criminally libelling three people. The statement made about one of them, Mrs. Nolan, was accurate in all essential respects. One cannot be punished for defamation if the facts in his statement are accurate, even if the statement is made maliciously. Since the jury's general verdict of guilt may have been based on the finding that Mrs. Nolan had been libelled, Ashton's conviction must be set aside.

IV. Ashton was convicted of making libellous statements about the official conduct of a High Sheriff and a Chief of Police. There was no proof that Ashton made the statements because of any personal feeling against the officers or that he believed or had reason to believe that his statements were false. The Court below held that Ashton's fail-

ure to ask the Sheriff and the Police Chief if the statements about them were true, was sufficient evidence of malice. The failure to make such inquiry may have been evidence of negligence, but it was not constitutionally sufficient evidence of evil intent to support a conviction of criminal libel.

V. The pamphlet said to be libellous was not distributed in quantity. Ashton delivered copies of the pamphlet to two or three policemen when they asked for them. The circumstances under which the police asked for the pamphlet justified the belief that Ashton was not at liberty to refuse their requests. The publishing of the alleged libel was therefore not voluntary or malicious and such limited distribution of a defamatory statement, as was made here, may result in a private injury but not in a public wrong punishable as a crime.

VI. The Court is urged to reconsider its prior ruling that, if constitutional safeguards are afforded in a proper case there may be a criminal prosecution for defamation of public officials with respect to the performance of their official duties. It is submitted that criticism of the work of government authorities should be completely privileged.

## POINT I

**Ashton's conviction of common-law criminal libel was a violation of the constitutional guarantees of due process and of freedom of the press because of the vagueness and breadth of the law, and because it provided for punishment of communications that do not present a danger to the state or the public welfare.**

There is an ancient maxim that where the rule of law is uncertain there is no law. It is still sound. If a penal law is so vague that men of common understanding cannot know with reasonable certainty the conduct it condemns, then the meaning and comprehension of the law must be redetermined in each case. There is no assurance of consistent application, and no protection against harsh and discriminatory enforcement of such a law, and its meaning may change as different persons are called upon to enforce or interpret it. In consequence the rule is not by law but by the men in authority. *Shuttlesworth v. City of Birmingham*, 382 U. S. 87; *Cox v. Louisiana*, 379 U. S. 536, 579 (Mr. Justice Black concurring). The conviction of an accused under such law is obviously not with due process of law in accordance with the commands of the Fifth and Fourteenth Amendments. *Giaccio v. Pennsylvania*, — U. S. — (decided January 19, 1966); *Cramp v. Board of Public Instruction*, 368 U. S. 278, 283-284; *Jordan v. De George*, 341 U. S. 223, 239, 240; *Musser v. Utah*, 333 U. S. 95, 97; Due Process Requirements of Definiteness in the Statutes, 62 Harv. L. R. 77.

When a vague law makes publishing a penal offense, the law must also be condemned as infringing the right of

communication guaranteed by the First and Fourteenth Amendments. *Stromberg v. People of the State of California*, 283 U. S. 359, 369; *Herndon v. Lowry*, 301 U. S. 242, 258; *Thornhill v. Alabama*, 310 U. S. 88, 97-93; *Winters v. New York*, 333 U. S. 507, 509; *Speiser v. Randall*, 375 U. S. 513; *Bagette v. Bullitt*, 377 U. S. 360, 372; The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. R. 67, 81. As Mr. Justice Brennan wrote for the Court in *Smith v. California*, 361 U. S. 147, 151, "... this Court has intimated that *stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech*; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser" (emphasis ours). See also *Speiser v. Randall*, 375 U. S. 513, 526.

**A. The Kentucky Common-law of Criminal Libel as It Was Declared in Earlier Cases and by the Kentucky Court of Appeals in This Case, Is Unconstitutionally Vague, and Violates the Constitutional Guarantee of Freedom of the Press in Punishing Expression That Does Not Present a Serious and Imminent Danger to the Community.**

The Petitioner Ashton was sentenced to six months in prison and was fined \$3,000 (R. 144) for printing a pamphlet said to have been prohibited by the common-law of Kentucky (R. 145). The Kentucky common-law, as the following analysis of its sources will show, did not and does not furnish any adequate standard for determining the guilt or innocence of anyone accused of criminal libel. Whether a particular statement fell or falls within the condemnation of the law was and is left to the notions of the trial jury in each case.<sup>3</sup>

<sup>3</sup> Under the Kentucky Constitution the trial jury in a libel case determines the law and the facts under the Court's direction (Section 9, Constitution of Kentucky, p. 3 of this brief).

The Court below indicated that there may be some question with respect to whether the Constitution requires certainty in common-law crimes as it does in criminal statutes (R. 146). We believe greater certainty is required when an act is made criminal by the common-law. Legislation is, presumably, a direct expression of the popular will and of the public policy. The common-law has its origin in decisions of judges based, at least initially, on personal concepts of natural-law and justice. Common-law Crimes in the United States, 47 Col. L. R. 1332. See *Cantwell v. Connecticut*, 310 U. S. 296, 306-308; *Pierce v. U. S.*, 314 U. S. 306, 311. In *Bridges v. California*, 314 U. S. 252, the Court said (p. 260):

"It is to be noted at once that we have no direction by the legislature . . . that publications . . . should be punishable. As we said in *Cantwell v. Connecticut*, 310 US 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' Id. 308. Cf. *Herndon v. Lowry*, 301 US 242, 261-264." (emphasis ours)

We are not concerned here with a common-law doctrine that, because of number of consistent interpretations by the Courts, acquired definite and concrete meaning so that all within its purview have a clear concept of its meaning. The definitions and canons of the common-law crime of libel in Kentucky, were, prior to the instant case, set out in six cases decided during the years from 1888 to 1927. English precedent cannot be used to determine the reach of the

Kentucky common-law, for as the Court of Appeals said in its opinion below, Kentucky broke from the English traditional law of libel (R. 150) and established its own common-law principles.

There is considerable variation in the definitions of criminal libel in the few opinions on the subject in Kentucky. None of the opinions enable those governed by the law to draw a line between the language that the law punishes and the language it permits. Chief Justice Moremen and Judges Stewart and Milliken dissenting in the Court below, wrote:

“ . . . since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.” (R. 158)

*Tracy v. Commonwealth*, 87 Ky. 578 (1888), the first recorded case in Kentucky in which the existence of the common-law crime of criminal libel was acknowledged, defined criminal libel as:

“a public wrong. The publication is in effect a breach of the peace; it produces public mischief and for that reason is an indictable offense. It is a breach of the peace whether published as to one or more persons.” (87 Ky. at 584)

A related definition of the crime was given in *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84 (1903), a

civil suit for malicious prosecution. The Court there held (p. 89):

"a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable."

The statements that the publications condemned are "in effect a breach of the peace" or are "calculated to create disturbances of the peace" do not, obviously, give any indication of the kind of communication that the law forbids. Cases discussing the vagueness and impropriety of that standard are examined in subdivision B of this Point. All of the other opinions in Kentucky that discuss the elements of the common-law crime of criminal libel,<sup>4</sup> including the opinion of the Kentucky Court of Appeals in this case, hold directly or connote that one may be held criminally responsible for *every* libel *per se* made with malice (that is, made with knowledge that the statement is false, or made without good reason to believe the statement to be true).<sup>5</sup>

In *Browning v. Commonwealth*, 116 Ky. 282, the Court said (p. 285):

<sup>4</sup>*Smith v. Commonwealth*, 98 Ky. 437 (1895); *Browning v. Commonwealth*, 116 Ky. 282 (1903); *Commonwealth v. Duncan*, 127 Ky. 47 (1907); *Cole v. Commonwealth*, 222 Ky. 350 (1927). The Court below also cited *Yancey v. Commonwealth*, 135 Ky. 207 (1909) as one of the Kentucky cases that has recognized the common-law crime. However, the elements of the crime are not discussed in the opinion.

<sup>5</sup>In its opinion below the Court of Appeals of the Commonwealth of Kentucky wrote "in *Riley v. Lee*, 88 Ky. 603, 11 ALR 586, malice was defined as the intentional publication of defamatory matter 'without justifiable cause'. This was a civil suit but it is a broad description of the mental state which constitutes actual malice in criminal libel" (R. 152).

*“Any defamatory words calculated to injure or degrade the reputation of a person in society when written or published maliciously are libelous . . . and the law is equally well settled that where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society”* (emphasis ours) (116 Ky. at 285).

*Cole v. Commonwealth*, 222 Ky. 350 (1927) the most recent Kentucky case on the subject (prior to the one at bar), which was cited with approval in the opinion below (R. 151), defines criminal libel as:

*“any false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society.”* (emphasis ours) (222 Ky. at 358)

And the Court of Appeals of the Commonwealth wrote, in its opinion in this case:

*“As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice.”* (R. 151)

Libels *per se* in Kentucky have been defined as “words that sound to disreputation of the persons spoken of . . .” *Sweeney & Co. v. Brown*, 60 S. W. 2d 381. Such libels include *any* false publication that would “blacken the memory of one who is dead . . . or injure one who is alive” (*Cole v.*

*Commonwealth*, 222 Ky. 350, 358) or "prejudice one in his calling, trade or profession . . . or that might cause one to be disinherited" (*Williams v. Riddle*, 145 Ky. 459, 462). Under the prevailing definition of common-law criminal libel in Kentucky, one is guilty of a crime punishable by imprisonment for a year and a fine of \$5,000 if he writes, knowing the statement to be untrue, that a person's ancestor was obnoxious,<sup>6</sup> or that a barber is careless, or that a carpenter is incompetent, or that a person does not respect his living parents, or that a person is a hypocrite,<sup>7</sup> or that one filed a motion *in forma pauperis*,<sup>8</sup> or that one did not pay a store bill and it was necessary to send a bill collector to his home,<sup>9</sup> or that there was a mortgage due on a car that one sold free of lien.<sup>10</sup>

The sweep of the Kentucky criminal law is so broad, and it punishes such trifling abuse of the right of expression, that the law must for those reasons fall as an unwarranted invasion of the right of the press. It is a commonplace that communication cannot be punished unless it is of such character that its utterance would create a serious and present or imminent danger of substantive evil to the State or to the general welfare. *Herndon v. Lowry*, 301 U. S.

---

<sup>6</sup> Apparently one may be guilty of criminal libel for insulting the memory of a deceased person, no matter how long he has been dead, so long as there are surviving relatives who may be offended. See discussion of common-law criminal libel in *State v. Haffer*, 94 Wash. 136, 140-141 in which the Court sustained the conviction of a defendant in 1916 for publishing an article exposing the memory of President George Washington to hatred, contempt and obloquy.

<sup>7</sup> *Shields v. Brooks*, 238 Ky. 678.

<sup>8</sup> *Metzger v. Washington Post Co.*, 40 App. D. C. 565.

<sup>9</sup> *Thompson v. Adelberg & Berman*, 186 Ky. 487.

<sup>10</sup> *Eby v. Wilson*, 289 S. W. 639.

242; *Pennekamp v. Florida*, 328 U. S. 331; *Terminiello v. Chicago*, 337 U. S. 1. As Mr. Justice Black wrote in *Bridges v. California*, 314 U. S. 252 at p. 263:

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression . . . They do no more than recognize a minimum compulsion of the Bill of Rights."

And as the Court said in *Thomas v. Collins*, 328 U. S. 331, 353, "Only the gravest abuses endangering paramount interests, give occasion for permissible limitations. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction . . ."

The assumption, made by some state Courts, that libellous statements are not within the protection of the First and Fourteenth Amendments and can, therefore, be punished without a showing of clear and present danger, is unfounded. The Court wrote in *New York Times Co. v. Sullivan*, 376 U. S. 254, 269 "we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N. A. A. C. P. v. Button*, 371 US 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

See also *Garrison v. Louisiana*, 379 U. S. 64, 67 (footnote 3), 70.

Most of the publications that the Kentucky criminal law punishes are not likely to produce any harm to the public or even any serious injury to the individuals libelled. In *Garrison v. Louisiana*, 379 U. S. 64, the Court (at pp. 69-70) quoted with approval the following statement in the Model Penal Code of the American Law Institute:

*"It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security . . . It seems evident that personal calumny falls in neither of these classes in the USA, that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country . . ."* (Emphasis ours.)

**B. The Definition of the Offense of Criminal Libel in the Trial Judge's Charge to the Jury in This Case Was Unconstitutionally Vague, and It Violated the Requirements of Due Process in Attributing Guilt to a Writer Because His Readers' Reaction Might Be Violent.**

The Trial Judge advised the jury that Ashton was guilty if the statements about Luttrell, Combs and Mrs. Nolan were "false and libellous" and were written to injure and disgrace them (R. 125). He then said:

"The Court further instructs the jury that criminal libel is defined as any writing calculated to create dis-

turbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." (R. 125)

That was the only explanation that the jury received of the meaning of the term "libel" or "libellous". The jury was left free to determine whether the language used in the pamphlet *Notes on a Mountain Strike* would *be likely*<sup>11</sup> to influence the reader to breach the peace or to commit a criminal or an immoral act. In *Cantwell v. Connecticut*, 310 U. S. 296, the appellant Cantwell was convicted on one count, of the common-law crime of inciting a breach of the peace. He was charged with having played, in the hearing of Catholics on a public street, a phonograph record which bitterly attacked the Catholic religion and church. The Court held, in reversing Cantwell's conviction (p. 308):

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others . . . [A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. *Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.*" (Emphasis ours.)

---

<sup>11</sup> We must assume that the word "calculated" in the Trial Court's definition refers to the probable consequence of the language, and not to the writer's intent, for his intent alone could not be punished.

In *Winters v. New York*, 333 U. S. 507, 518-519 (1948), the Court held unconstitutionally vague a statute that prohibited the publishing of material "so massed as to become vehicles for inciting violent and depraved crimes against the person." The Court found "the specification of publications prohibited from distribution, too uncertain and indefinite" to sustain any criminal conviction (333 U. S. at p. 519). Although the language of the statute in the *Winters* case was, we believe, more informative than the definition in the instant case, the Court there found it was impossible for those subject to the law, or those charged with its enforcement, to know where to draw the line between allowable and forbidden publications, and as a result innocent conduct might be punished, or a person might be dissuaded from publishing proper material in the belief that it came within the ambit of the penal law.

"The clause," Justice Reed wrote, in *Winters v. New York*, 333 U. S. at p. 519, in language descriptive of the Trial Court's instruction in this case (that "libel is . . . any writing calculated to create disturbances of the peace"):

"proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person . . . 'It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.'"

In *Garner v. Louisiana*, 368 U. S. 157, Mr. Justice Harlan wrote in his concurring opinion, in language also applicable to the Trial Court's definition of criminal libel in this case (368 U. S. 157, at p. 202):

"But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, *it cannot do so by means of a general and all-inclusive breach of the peace prohibition*. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.'" (Emphasis ours.)

See also *Thornhill v. Alabama*, 310 U. S. 88, 105; *Edwards v. South Carolina*, 372 U. S. 229, *Henry v. Rock Hill*, 376 U. S. 776 and *Cox v. Louisiana*, 379 U. S. 536; *Garrison v. Louisiana*, 379 U. S. 64.

Defining a criminal libel as a breach of the peace is a reflection of the view, prevalent during the 14th to the 17th centuries, that a derogatory statement will provoke violence. Libel was considered a public wrong because it was assumed that the person who had been derogated, and his friends and family, would seek private retribution and as a result, cause a disturbance of the peace of the community.<sup>12</sup> *Garrison v. Louisiana*, 379 U. S. 64, 68-69; Brant, *Seditious Libel: Myth and Reality*, 39 N. Y. U. L. R. 1; Lovell, *The Reception of Defamation By the Common Law*, 15 Vand. L. R. 1051. Whether a defamation will enrage one to the point of violence depends, not on the nature of the

<sup>12</sup> As Coke wrote in his comment on "The Case de Libellis Famosis or of Scandalous Libels", 3 Coke 254 (1826 ed.), "for although the libel be made against one, yet it incites all those of the same family, kindred or society, to revenge and so tends, *per consequens* to quarrels and breach of the peace and may be the cause of shedding of blood and of great inconvenience . . ." *Constitutionality of the Law of Criminal Libel*, 52 Col. L. R. 521, 522.

insult, but on the temperament of the person insulted. Applying contemporary community standards, it is doubtful that any libel will arouse the "average reasonable prudent man" to break the peace. As Mr. Justice Brennan wrote for the Court in *Garrison v. Louisiana*, 379 U. S. 64, 69:

"... Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that '... under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.' Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 924 (1963)."

It is doubtful that any law, even one precisely worded, can constitutionally punish a publication because the publication may lead to a breach of the peace. If the disorder or disturbance of the peace arises from the violence of the audience's reaction, the authorities are obliged to restrain the audience, not to prohibit the speech or expression. As Zacharia Chafee wrote in *Free Speech in the United States* (1941) at p. 151, "It makes a man criminal simply because his neighbors have no self control and cannot refrain from violence." See also *Kunz v. New York*, 340 U. S. 290, 294, 295; *Terminiello v. Chicago*, 337 U. S. 1; *Hague v. C. I. O.*, 307 U. S. 496, 516.

*Terminiello v. Chicago*, 337 U. S. 1, involved an ordinance that, as construed, punished a statement as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, . . ."

The Court said, in holding the law unconstitutional (337 U. S. 4):

" . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, supra (315 US, pp. 571, 572), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view."

If an utterance can be prohibited because it *may* arouse an audience to violence, then, as John Stuart Mill noted, the "least educated and most intemperate citizens would become the arbiters of permissible expression." John Stuart Mill, *On Liberty*, Chapter 2 (MacMillan). As Chief Justice Hughes said in *Near v. Minnesota*, 283 U. S. 697, 722:

"The danger of violent reactions becomes greater with effective organization of defiant groups . . . and if this consideration warranted legislative interference with the national freedom of publication, constitutional protection would be reduced to a mere form of words."

We are not suggesting that incitement to violence may not be punished. The Kentucky law of criminal libel is directed at injury to reputation, not at the direct instigation of public disorder. See *Yates v. United States*, 354 U. S. 298, 318.

*Beauharnais v. Illinois*, 343 U. S. 250, cited in the opinion of the Kentucky Court of Appeals (R. 148, footnote 8) presented a different question from the one under consideration. In *Beauharnais*, the Court "by the narrowest of margins"<sup>13</sup> sustained a conviction under a statute that made it unlawful to publish material portraying a racial or religious group as depraved or criminal. The defendant in that case handed out leaflets at a public meeting of a White Circle League, and instructed those present to distribute the leaflets on the street corners in Chicago. In the leaflets negroes were described as rapists and thieves, addicted to marijuana. The majority of the Court, in upholding the defendant's conviction in *Beauharnais*, noted that the statute was narrowly drawn to reach a specific evil, was read in "the animating context of well-defined usage" and was designed to prevent a serious and imminent danger, namely, racial strife and riot, for Illinois had "been the scene of exacerbated dissension between races often flaring into violence and destruction." (343 U. S. 253, 259-261)

The disparities between the law involved in *Beauharnais* and the Kentucky law of criminal libel as it was construed by the trial judge in this case, mark the constitutional deficiencies of the Kentucky law. In *Beauharnais* the law was "narrowly drawn to punish specific conduct", namely,

<sup>13</sup> *Garrison v. Louisiana*, 379 U. S. 64, 82, Mr. Justice Douglas concurring.

racial or religious vilification in which the racial or religious group was portrayed as depraved or criminal. The Kentucky law penalizes *all* disparaging statements "sounding to the disreputation of a person", that are made with knowledge of their falsity or without cause to believe them true. In *Beauharnais* the language of the statute was further limited in its application by consistent usage and a considerable number of uniform State Court interpretations. The definitions of the crime set out in the Kentucky opinions do not provide any reliable guide lines for the application of the law in a given case. The Kentucky law has been interpreted only six times in the 75 years following its pronouncement, and each interpretation differed from the others. The libels punished in *Beauharnais* presented a serious threat to public order because, under circumstances then existing, they were tantamount to a direct incitement to riot. The injuries sustained because of statements punished by the Kentucky common-law, are personal and for the most part slight.

The Trial Judge also advised the Jury that Ashton was guilty of a crime if he published a writing "calculated to . . . corrupt the public morals" (R. 125). That phrase also has been held too indefinite to meet constitutional requirements when used in a law regulating speech or press. See *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Musser v. Utah*, 333 U. S. 95; *Commercial Pictures Corp. v. Regents*,\* 346 U. S. 587 (decided under the caption *Superior Films v. Dept. of Education of State of Ohio*); *Holmby Productions, Inc. v. Vaughn*,\* 350 U. S. 870.<sup>14</sup>

---

<sup>14</sup> The opinions marked with an asterisk are memorandum opinions. The statutes held unenforceable will be found in the opinions of the lower courts.

## POINT II

The criminal libel law as applied by the Trial Court was unconstitutional. The affirmance of Ashton's conviction under a narrower interpretation of the law in conflict with that given in the Trial Court's charge to the jury, was a denial of due process and of equal protection of the laws.

The trial judge in defining criminal libel as "any writing calculated to create disturbances of the peace" (R. 125) was following precedent set out in several opinions of the highest court of the Commonwealth. Four of the six Kentucky cases that discuss the ingredients of the common-law offense, describe a libellous publication as "in effect a breach of the peace",<sup>15</sup> as writing that tends "to provoke violence and disturb the peace of society",<sup>16</sup> and as writing "calculated to create a disturbance of the peace".<sup>17</sup>

More than a year and a half after Ashton was convicted (R. 8, R. 144) the Kentucky Court of Appeals declared, in affirming his conviction, that the "broad common-law concept of what constituted 'a breach of the peace' is no longer a constitutional basis for imposing criminal liability" (R. 151). "The offense", the Court said, "is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a 'breach of the peace' or to induce others to commit a public offense" (emphasis ours) (R. 150). And, the Court of Appeals added in its opinion below:

<sup>15</sup> *Tracy v. Commonwealth*, 87 Ky. 578.

<sup>16</sup> *Browning v. Commonwealth*, 116 Ky. 282.

<sup>17</sup> *Commonwealth v. Duncan*, 127 Ky. 47, and *Prov. Sav. Life Assurance Soc. v. Johnson*, 115 Ky. 84.

"None of our Kentucky cases based the criminality of the act upon the tendency to cause a 'breach of the peace' or the commission of an 'indictable offense.' *To the extent they defined the defamatory nature of the words in these terms, they are obsolete.*" (R. 151) Emphasis ours.

The Trial Judge in explaining the nature of the crime to the Ashton jury used the "obsolete", "unconstitutional" definition. He was unaware, and had no way of divining, that the prior opinions of the Kentucky Court of Appeals were in error to the extent that they characterized criminal libels as writings that caused breaches of the peace. The earlier opinions dealing with criminal libel had not been overruled or in any way modified, before Ashton was tried or before his conviction was affirmed. It is true, as the Court below observed, that in its most recent opinion on the subject *Cole v. Commonwealth*, 222 Ky. 350 (1927), "no mention is made of the possibility of public disturbance which might be incited by the publication." (R. 151). The Court's failure in *Cole* to refer to that element of the crime was not an intimation that the law had been changed, for the opinion in *Cole* cited *Commonwealth v. Duncan*, 127 Ky. 47 with approval, and in the latter case criminal libel was defined, in part, as a writing "calculated to create disturbances of the peace, to corrupt the public morals or to lead to any act which when done is indictable." (127 Ky. at p. 53)

Whether the Trial Judge's interpretation of the law was correct, the Ashton jury derived its knowledge of the law from his instructions, and the jury was required to apply the Court's statement of the law to the facts of the case *Walston v. Commonwealth*, 32 Ky. L. Rep. 535. It

must be assumed that the jurors found Ashton guilty because they believed his statements "were calculated to cause disturbances of the peace" or would lead to an indictable offense. Ashton's conviction was based on a version of the law that was unconstitutional and that the Kentucky Court of Appeals held unconstitutional.

The Court of Appeals had the authority to reinterpret the law on the appeal in this case, but the wrong done in convicting Ashton under an unconstitutional version of the law was not cured by a later change in the law.<sup>18</sup> *Shuttlesworth v. Birmingham*, 382 U. S. 87; *Bailey v. Alabama*, 219 U. S. 219, 234-235. Since Ashton was not convicted under an operative law, his conviction could not be validated by a changed concept of the law on appeal.

In *Shuttlesworth v. Birmingham*, 382 U. S. 87, the Petitioner was convicted under a city ordinance (Section 1142) which, given a literal construction, was unconstitutional because of its breadth and vagueness. After *Shuttlesworth* was found guilty, the Alabama Court of Appeals gave the ordinance "an explicitly narrow construction", thus removing the constitutional objection to it. On the appeal to this Court it was urged that *Shuttlesworth's* conviction was not under an obscure law because the ordinance as construed by the highest Court of the State was not ambiguous. But there was nothing in the trial record to indicate that the Court that convicted *Shuttlesworth*, interpreted the ordinance in the way that the Alabama Court of Appeals subsequently construed it. In an opinion written by Mr. Justice Stewart, the Court held, in reversing *Shuttlesworth's* conviction (382 U. S. 87):

---

<sup>18</sup> As shown in Point I of this Brief, the law as reinterpreted by the Court of Appeals in this case is also unconstitutional.

"The present limiting construction of Section 1142 was not given to the ordinance by the Alabama Court of Appeals however until . . . two years after the petitioner's conviction in the present case. (382 U. S. 87, 91-92)

• • • • •

Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under Section 1142 cannot stand." (382 U. S. at p. 92)

In *Shuttlesworth* the conviction was reversed because of the *possibility* that the Trial Court adopted an unconstitutional construction of the law governing the offense. In the instant case there can be no doubt that Ashton was judged under an unconstitutional construction of the law.

The Court of Appeals, in changing the meaning of the law in its order affirming Ashton's conviction also denied due process and the equal protection of the laws in connection with Ashton's appeal to that Court. The appeal proceeding was available to all in similar circumstances as a matter of right. Kentucky Code of Criminal Procedure, §347 (p. 4 of this Brief). The appeal was as much a part of the process of law to which Ashton was entitled as any other. *Frank v. Magnum*, 237 U. S. 309, 327; *Cochran v. Kansas*, 316 U. S. 255, 258; *Griffin v. Illinois*, 351 U. S. 12, 18. The Kentucky Court of Appeals, in changing an essential element of the crime after Ashton was convicted, denied him the right of a hearing on appeal with respect to the constitutionality of the statute as it was applied in his case. As Mr. Justice Black wrote in the first

case entitled *Cole v. Arkansas*, 333 U. S. 196, 202, "To conform to due process of law petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

In the first *Cole* case, 333 U. S. 196, Cole's conviction was reversed because he had been tried and convicted of violating one section of the penal statute and his conviction had been affirmed by an appellate court under another section of the same statute. Thereafter Cole was retried and convicted again. On his second petition to this Court Cole contended that he was entitled to a reversal because the state Appellate Court's interpretation of the penal statute on the second appeal was in conflict with the Trial Court's construction. Cole argued that he had again, in effect, been tried under one law and that his conviction had been affirmed under another. The Court found in the second *Cole v. Arkansas*, 338 U. S. 345, that there was no substantive difference between the second Trial Court's construction of the statute and the construction given on the appeal from the second conviction. The Court said, however, that if Cole's charge had been supported by the record, he would have been entitled to prevail. *Cole v. Arkansas*, 338 U. S. 345, at p. 348. In the case at bar it cannot be doubted that the Trial Court's interpretation of the law was at variance with the one adopted by the Appellate Court.

The affirming of Ashton's conviction under a changed version of the law also offends due process because it deprived Ashton of the right to know the essential elements of the crime of which he was accused, in advance of his trial. One charged with offending against a penal law

cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally v. General Construction Co.*, 269 U. S. 385, 391, 392-393, 395; *Thomas v. Collins*, 323 U. S. 516, 535. A retroactive change in the definition of the crime after one has been convicted of committing it denies both the opportunity to avoid offending the law and the opportunity to prepare the defense against the charge of violating it.

It is true that there is no absolute prohibition against the retrospective application of a decision that changes the law. See *Linkletter v. Walker*, 381 U. S. 618, *Tehan v. Shott*, — U. S. —, Jan. 19, 1966. The *Linkletter* and *Tehan* cases hold that a revised Court interpretation of existing law may be made prospective or retrospective *as the interests of justice dictate*. We believe the interests of justice and the due process clauses prohibit Appellate Courts from applying a new definition of a crime in a case on review, where the retroactive change results in the affirming of a judgment of imprisonment that had been imposed by unconstitutional means. *Shuttlesworth v. Alabama*, 382 U. S. 87; *Linkletter v. Walker*, 381 U. S. 618, 639 (footnote 20) (opinion of the Court) and at p. 645 (dissenting opinion); *James v. United States*, 366 U. S. 213; cf. *England v. Louisiana*, 375 U. S. 411, 422.

## POINT III

**Ashton's conviction of criminal libel violated the constitutional guarantee of freedom of the press because the statements made about the complaining witness, Mrs. Nolan, were true.**

The statement said to be "libellous and defamatory" of Mrs. Nolan was:

"'The town newspaper, the Hazard Herald, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still,' " (R. 123)

To justify criminal prosecution for libel, the defamation must charge serious vice or disgraceful behavior or scandalous misconduct "which exceptionally disturbs the community's sense of security" *Garrison v. Louisiana*, 379 U. S. 64, 70. The charge against Mrs. Nolan does not affect the

security of the community and does not appear sufficiently grave to warrant imprisoning the person who made it.<sup>19</sup>

But the quoted language may not be held libellous for a more compelling reason—namely, because it was true in all essential respects. As Mr. Justice Brennan wrote for the Court in *Garrison v. Louisiana*, 379 U. S. 64, “We agree . . . ‘If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice . . .’ (379 U. S. at p. 73) . . .”

The Court below found: “. . . there was sufficient evidence that the statements accusing her (Mrs. Nolan) of a breach of trust in the distribution of certain funds were in essence false” (R. 145). The record does not support that determination. And in a case such as this one, where the State Court holds as a result of its decision on the facts, that a constitutional right has not been denied, this Court will make its own evaluation of the evidence. Any other rule would permit frustration of guaranteed rights by an erroneous finding of fact. *Wood v. Georgia*, 370 U. S. 375; *New York Times Company v. Sullivan*, 376 U. S. 254, 285, and cases there cited.

The evidence in the case, particularly Mrs. Nolan’s testimony on cross-examination, reveals that the statement made about her was true in all material respects. The pamphlet, *Notes on a Mountain Strike*, stated:

(1) that the newspaper owned by the Nolans accused the Communists of fomenting the strike (*that was in fact the newspaper’s position* (R. 55)).

<sup>19</sup> See argument at pp. 21-23 of this Brief.

(2) that the newspaper received over \$14,000 and food and clothing (*the paper received approximately \$20,000 and food and clothing* (R. 55-56)).

(3) that the money was sent as a result of a television broadcast about the plight of miners in the area. (*Mrs. Nolan agreed that the money was contributed as a result of a television broadcast and admitted that one television program was "devoted almost exclusively to the unemployed coal miners"* (R. 56-57)).

(4) that Mrs. Nolan was against labor. Mrs. Nolan protested that she had no "feelings against" miners because they were on the picket line, but the following portion of her testimony revealed a different attitude:

"Q32. And Hazard and Perry County was one of the centers of this labor unrest. Now, from your own personal knowledge, don't you know that there was strikes; that there was picketing?

A. I have a different name for them, Mr. Combs.

Q33. What is your name for them?

A. I would rather not say.

Q34. Why?

The Court: Well, you have another name. Go ahead and tell the jury now. What is your name for them?

A. No, I'll not tell the jury.

The Court: Well, you will, or I will send you to jail.

A. Well, that's all right, if you want to.

The Court: You answer that question.

Q35. What is your name for these poor underprivileged, unemployed picketing coal miners, Mrs. Nolan?

A. They weren't unemployed at that particular time. They were people that had been worked out of jobs and things" (R. 59).

(5) that only \$1100 of the money received by the newspaper was used to aid the striking pickets and none of the food and clothing was given to them (*the pickets received only \$1100 from the fund and no food or clothing was distributed to them* (R. 65)).

(5) that food and clothing received as a result of the telecast was still undistributed and remained under lock and key (*some of the clothing was still undistributed at the time of the trial and was then in a warehouse under lock and key* (R. 66)).

The Trial Judge, in commenting on the alleged defamation of Mrs. Nolan, said (R. 97):

"She hadn't given the pickets but Eleven Hundred Dollars, and she hadn't distributed all of the things that had been sent. She does have part of them left, and what she's going to do with it, God Almighty only knows. I don't."

And the Trial Judge added that Ashton "came pretty close on Mrs. Nolan" (R. 97).

The Attorney General of the Commonwealth claimed in his brief in opposition to the Petition for Certiorari, that the statement about Mrs. Nolan in the pamphlet was in-

accurate in that: the money, food and clothing were *not* sent to the Hazard Herald as the result of a TV show on the strike (as stated in the pamphlet) but came as a result of another TV presentation; and that the aid was not "supposed to be sent to the pickets" (as set forth in the pamphlet) but was to be distributed to all needy persons.

Whether money was received as a result of one or another television show broadcast from the area, and whether the money sent to the television company (and paid over at Mrs. Nolan's request to The Hazard Herald Helping Fund (R. 57) ) was intended primarily for the picketing miners or for all needy people in the area, was purely a matter of conjecture.<sup>20</sup> There was no proof that Mrs. Nolan's conclusion was the correct one or that the statement attributed to Ashton was false. Moreover, the punishment of such slight inaccuracies of expression—if they were inaccuracies—must be held an infringement of the right of the press for the Constitutional protection of communication is not limited to statements that are literally true in every detail.<sup>21</sup> The Court said in *New York Times Co. v. Sullivan*, 376 U. S. 254, at pp. 271-272, "... erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive,' *N. A. A. C. P. v.*

<sup>20</sup> "Men are entitled to speak as they please in matters vital to them; errors in judgment or unsubstantiated opinion may be exposed but not through punishment for expression. Under our system of government counter argument and education are weapons available to expose these matters, not the abridgement of the right of free speech." *Wood v. Georgia*, 370 U. S. 375, 389.

<sup>21</sup> In *New York Times Co. v. Sullivan*, 376 U. S. 254, the Court said of statements that were allegedly false in minor respects (p. 289): "The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems . . ."

*Button*, 371 US 415, 433". See also *Near v. Minnesota*, 283 U. S. 697, 718; *Cantwell v. Connecticut*, 310 U. S. 296, 310; *Ernde v. San Joaquin County*, 23 Cal. 2d 146, 160; *Fort Worth Press v. Davis*, 96 S. W. 2d 416 (Tex.); *Smith v. Byrd*, 225 Miss. 331; Constitutionality of the Law of Criminal Libel, 52 Col. L. R. 521, 532 (1952).

The verdict of guilty in this case was a general one without any special finding. It is not possible to identify the particular statement for which Petitioner was convicted. The verdict must therefore be set aside for the jury may have found Ashton guilty in the belief that Mrs. Nolan had been libelled. In *Williams v. North Carolina*, the Court said, 317 U. S. 287, 291-292 (1942):

"If one of the grounds for conviction is invalid under the Federal Constitution the judgment cannot be sustained . . . To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

#### POINT IV

The State failed to produce any evidence that the statements about the official conduct of the Chief of Police and the High Sheriff, were made with malice. Ashton's conviction therefore violated the constitutional guarantee of freedom of the press.

The right to criticize and condemn government policies and 'the stewardship of public officials' is fundamental to the democratic process. *New York Times Co. v. Sullivan*, 376 U. S. 254, p. 275. To ensure the free and uninhibited exercise of that right and duty, the First Amendment protects misstatements about the work of government officers, so long as the statements are not made with deliberate malice.

The statements that Petitioner allegedly published about the High Sheriff Combs, and the Chief of Police Luttrell, were unpleasant, and were inaccurate in part—(although substantially true). But they were made as part of a document written to describe the conditions then existing in Hazard and Perry Counties, and to call to account the public officials who were thought responsible.

In *New York Times Co. v. Sullivan*, 376 U. S. 254, 270, the Court spoke of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." and the Court concluded that neither factual error nor defamatory content, won both in combination "suffices to remove the constitutional shield from criticism of official conduct." 376 U. S. at p. 273.

"The constitutional guarantees," Mr. Justice Brennan wrote for the Court (p. 279), "require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . ." The Court thereafter emphasized (376 U. S. at p. 281) that "in such a case the burden is on the plaintiff to show actual malice in the publication of the article." The principles set out in the *New York Times* case were held applicable to criminal prosecutions for libel in *Garrison v. Louisiana*, 379 U. S. 64, in which the Court said (pp. 74-75): "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."

If those in positions of power can stifle or punish criticism of themselves, then "the right of freely examining public characters and measures, and of free communication among the people thereon . . . the only effectual guardian of every other right" will be lost.<sup>22</sup> The Court will note that in the recent cases involving libel prosecutions, including the instant case, the proceedings were initiated by government authorities in reprisal against those who found fault with their conduct.<sup>23</sup> See *Constitutionality of the Law of Criminal Libel*, 52 Col. L. R. 521, 533 (1952); Keely, *Criminal Libel and Free Speech*, 6 Kan. L. R. 295 (1958).

<sup>22</sup> From *The Report on the Virginia Resolutions* quoted in *New York Times Co. v. Sullivan*, 376 U. S. 254, 274.

<sup>23</sup> The High Sheriff and Police Chief testified that on the day after seeing the pamphlet that they found insulting, they swore out a warrant for Ashton's arrest (R. 78, 25).

In its opinion below the Kentucky Court of Appeals conceded that *New York Times Co. v. Sullivan*, 376 U. S. 254, and *Garrison v. Louisiana*, 379 U. S. 64, require a showing of actual malice to support a recovery in a civil action, and a conviction in a criminal case, for the libelling of public officials (R. 153). But the Court ruled (we believe erroneously) that *independent* proof of malice was not required (R. 153).

The only evidence of malice proffered at the trial was the testimony that Ashton did not make any effort to ascertain the truth from the three complaining witnesses, and that they would have told him the truth if he had asked (R. 29, 53, 74). The Kentucky Court of Appeals found that evidence sufficient to show that Ashton was motivated by actual malice because, it said, he "was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant (Ashton) and the prosecuting witnesses were in opposing camps." (R. 153-154; matter in parentheses ours.)

Petitioner's unfamiliarity with the place, and the fact that he didn't know the people, did not warrant the inference that he bore the Sheriff or the Police Chief any ill will. Nor may it reasonably be assumed that Petitioner was evilly disposed toward the complaining witnesses because they differed about a dispute between mine workers—in which Petitioner was not directly involved.

The inaccurate statements made about the High Sheriff and the Police Chief were not, in the light of the known and

admitted facts, so immoderate and defamatory that enmity towards the officials can be imputed. The High Sheriff had countenanced, and had been held liable for, extreme violence and brutality against a defenseless prisoner in his care (R. 71-72, 78). There was sufficient evidence of his responsibility for a homicide to justify a grand jury indictment against him (R. 72). The Chief of Police, if not directly responsible for the threat to kill Lieutenant Kilburn (whose views and sympathies were opposed to his own), was aware that it had been made and did nothing about it other than to repeat the threat (R. 121).<sup>24</sup>

Even if the evidence justified the conclusion that Ashton's report was motivated by animosity, the State did not offer any evidence to show that Ashton knew that his statements were not accurate. The constitutional protection afforded to misstatements about official conduct extends to words written in hatred, so long as the writer did not know that his statements were false. The criminal defamation statute involved in *Garrison v. Louisiana*, 379 U. S. 64, was held to incorporate constitutionally invalid standards because it "permitted a finding of malice based upon an intent merely to inflict harm, rather than an intent to inflict harm through falsehood." (379 U. S. at p. 73).

Ashton's failure to confront the Sheriff and the Police Chief with the statements about their misconduct is certainly not strange under the circumstances, and may not in any circumstance be held proof of actual malice on his part. The failure to check a primary source of information is at most proof of negligence, but not of an evil intent. The

---

<sup>24</sup> "People have good authority for believing that grapes do not grow on thorns nor figs on thistles" (*Coleman v. McLennan*, 78 Kan. 711, 739, quoted in *Garrison v. Louisiana*, 379 U. S. 64, 77).

court, in *Garrison v. Louisiana*, 379 U. S. 64, held specifically that proof "that the exercise of ordinary care would have revealed that the statement was false," does not meet the constitutional requirement that malice be shown before such statement may be punished as a criminal libel. (379 U. S. at p. 135).<sup>\*</sup> In *New York Times Co. v. Sullivan*, 376 U. S. 254, the Court found that the newspaper's failure to check the material it published, even against its own files, did not show malice with "the convincing clarity the constitutional standard demands" 376 U. S. at pp. 286-287. See also *Moity v. Louisiana*, 379 U. S. 201 (per curiam).

## POINT V

**The alleged libel was not communicated to the public, and it was not published voluntarily or maliciously. Ash-  
on's conviction was therefore without due process and  
violated the constitutional guarantee of freedom of the  
press.**

One cannot be imprisoned for merely composing an insulting statement. No wrong is committed until the defamation is circulated or communicated. Criminal sanctions may be imposed on expression only when it presents a serious danger and disturbs or threatens the community. (See argument at pp. 21-23 of this brief.) The manner in which a statement is communicated is as important a factor in determining the gravity of the danger it presents, as is

---

<sup>\*</sup>The Court below held that publication of defamatory matter "without justifiable cause" constituted "actual malice in criminal libel" (R. 152). In *Garrison v. Louisiana*, 379 U. S. 64 the Court ruled that proof that a statement was not made "in the reasonable belief of its truth" did not satisfy constitutional demands (379 U. S. at pp. 78-79).

the nature of the information or misinformation in the statement.

In this case the pamphlet was "published" or delivered by Ashton to two or three local policemen. It was given to them at their request. The police officers who received the pamphlets were subordinates of Sam Luttrell, the Police Chief who supposedly had been defamed by the writing, and one of the officers was acting under Luttrell's direct order to bring him a copy of the pamphlet.

C. M. Begley, one of the city policemen, testified that in making a routine check in a room of a tavern on the evening of March 26, 1963, he saw Ashton working on the pamphlets (R. 80). They were then being prepared for distribution (R. 25, 28, 90). Begley asked Ashton for a copy of the pamphlet and Ashton handed one to him (R. 80-82). The following morning the pamphlet was shown to Chief Luttrell at police headquarters (R. 22). Luttrell then sent Patrolman Anderson Asher to the tavern to pick up another copy (R. 23-24). After Patrolman Asher returned with his copy of the pamphlet on March 27, 1963<sup>25</sup> a warrant for Ashton's arrest was secured. At the time Ashton was arrested on March 27th the other copies of the pamphlet were seized (R. 25-26). There was evidence that many copies of the pamphlet were prepared for mailing but

---

<sup>25</sup> Anderson Asher was acting as agent for Luttrell in receiving his copy of the pamphlet. In Kentucky, proof of publishing to a person other than the one defamed is required in a criminal prosecution for libel unless the indictment expressly charges that the defamatory matter was sent or delivered to the persons libelled with intent to provoke a breach of the peace. Roberson's New Kentucky Criminal Law & Procedure §1177 (2nd Ed. 1927). The indictment in this case did not make any such charge (R. 1).

they were taken by the police before they could be sent<sup>26</sup> (R. 27-28).

The Attorney General for the Commonwealth contended that the delivery of the copies of the pamphlet to Begley and Asher was a voluntary publication because Begley and Asher each separately testified, in strikingly similar language, that when he began to take a pamphlet from the top of the table in the tavern room (one on the 26th of March and the other on the following day), Ashton stopped him and got one from under the table and handed it to the officer (R. 80, 87). The volitional quality of Ashton's act may be judged from the following testimony given by Begley (Asher's statement was to the same effect):

"Q41. When you asked this young man for this pamphlet, did you tell him that you were not acting as a policeman when you made the request?

A. I didn't tell him nothin'. I just asked him for it.

Q42. And you were standing there in uniform with your hat on?

A. Yes, sir, I was.

Q43. And he gave you one?

A. Yes, sir, he did."<sup>27</sup> (R. 85)

Whether delivery of a writing to one, two or three policemen under such circumstances constitutes a publication,

<sup>26</sup> It was also claimed that a copy of the pamphlet was found at Mrs. Nolan's door (R. 53). Mrs. Nolan did not know who placed it there (R. 53). It may have been delivered by police who seized all copies of the pamphlet that were found. In any event, as the Court correctly ruled, delivery to Mrs. Nolan could not be considered publication because she was a complaining witness (R. 30).

<sup>27</sup> It would seem that Ashton was following the adage that where there is no choice, we do well to make no difficulty.

so limited a distribution of an alleged libel may not be punished as a crime. Vilification, disclosed to a very few people whose judgments do not influence or affect the public, is a private injury and is not "appropriate for penal control" *Garrison v. Louisiana*, 379 U. S. 64, 69 (quoting Model Penal Code, Tent. Draft No. 13, 1961 sec. 250.7 Comments, 44). The Trial Judge in this case erred in instructing the jury that delivery of the pamphlet to one person, "a third party" other than the prosecuting witnesses, was sufficient proof of publication to justify conviction (R. 126).

Following the precepts of *New York Times v. Sullivan*, 376 U. S. 254, and *Garrison v. Louisiana*, 379 U. S. 64, in order to sustain a conviction for criminal libel, the publishing of the defamation must, to meet constitutional requirements, be voluntary, *and* with intent to inflict harm *and* it must be made in a manner that will injuriously affect the community. The evidence of the publishing of the pamphlet in this case was constitutionally insufficient to support a conviction, for there was no proof that the libel was published or that it was published intentionally, or that it was published with malice, or that it was distributed publicly.

## POINT VI

**Imposing punishment for inaccurate and derogatory statements about the official conduct of public officers violates the constitutional guarantees of freedom of the press.**

The prevailing view of this Court, set forth in *New York Times v. Sullivan*, 376 U. S. 254, and in *Garrison v. Louisiana*, 379 U. S. 64, is that if constitutional safeguards are observed, there may be a criminal prosecution for the defaming of public officials with respect to their conduct in office. This case furnishes occasion for reconsideration of that view. See *New York Times v. Sullivan*, 376 U. S. 254, 293, 297 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg) and *Garrison v. Louisiana*, 379 U. S. 64, 79 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg); Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877, 924 (1963).

## CONCLUSION

The order appealed from should be reversed, for:

1. The Kentucky law of criminal libel as applied in Ashton's case is unconstitutionally vague and is based on an obsolete concept that attributes guilt to an accused because of the tendency of others to commit acts of violence.
2. The Kentucky law of criminal libel as interpreted by the Court of Appeals of the Commonwealth of Kentucky is unconstitutionally vague and violates the constitutional guarantee of freedom of the press in punishing, as a criminal offense, private defamation that in no way affects the public welfare.
3. The Petitioner was convicted under a law that was unconstitutional as interpreted by the Trial Court; and the Appellate Court below denied Petitioner Due Process in affirming his conviction under a changed construction of the law in conflict with that of the Trial Court.
4. The statement allegedly libelling Mrs. Nolan was true, and the jury may have based its general verdict of guilt on the finding that she had been libelled.
5. There was no evidence that the defamatory statements, criticizing official conduct of public officers, were made with malice.

6. There was no acceptable evidence of publication of the libel.

7. The First Amendment prohibits a conviction for criminal defamation of the official conduct of public officers.

March 10, 1966.

Respectfully submitted,

EPHRAIM LONDON

DAN JACK COMBS

*Attorneys for Petitioner*

*On the brief:*

EPHRAIM LONDON

HELEN L. BUTTENWIESER

MELVIN L. WULF



FILE COPY

United States Supreme Court,  
FILED

APR 16 1966

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

No. 619

---

STEVE ASHTON ----- PETITIONER

against

COMMONWEALTH OF KENTUCKY ----- RESPONDENT

---

**BRIEF FOR THE RESPONDENT**

---

ROBERT MATTHEWS  
ATTORNEY GENERAL

JOHN B. BROWNING  
ASSISTANT ATTORNEY GENERAL

Counsel for Respondent

---



## INDEX

|   | Page |
|---|------|
| STATEMENT OF THE CASE .....   | 1    |
| SUMMARY OF ARGUMENT .....   | 2    |
| <b>ARGUMENT:</b>  |      |
| <b>Point I</b>  |      |
| A. The Kentucky common-law offense of criminal libel, as declared in earlier cases and by the Kentucky Court of Appeals in this case, is not unconstitutionally vague and does not violate the constitutional guarantee of freedom of the press in punishing expression that does not present a serious and imminent danger to the community..... | 4    |
| B. The instructions to the jury in this case presented all the elements of the offense and properly defined the crime. The instruction that criminal libel is a writing calculated to create disturbances of the peace was favorable to petitioner .....  | 20   |
| <b>Point II</b>   |      |
| The criminal libel law as applied by the trial court was constitutional. The affirmance of petitioner's conviction was not under a different interpretation of the law than that given in the trial court's charge to the jury.....   | 23   |
| <b>Point III</b>  |      |
| There was sufficient evidence that the statements made about Mrs. Nolan were false .....  | 23   |
| <b>Point IV</b>   |      |
| There was sufficient evidence that the statements about the chief of police and the sheriff were made with actual malice consisting of a reckless disregard for the truth....   | 25   |
| <b>Point V</b>  |      |
| There was sufficient evidence that petitioner published the libelous matter .....   | 26   |
| <b>Point VI</b>   |      |
| In order to protect dedicated public servants from being unseated and the government from being toppled by calculated falsehoods, criminal sanctions must be applicable to defamatory statements concerning public officers published with knowledge of falsity or reckless disregard for the truth .....   | 27   |
| CONCLUSION .....  | 29   |



# TABLE OF CASES AND OTHER AUTHORITIES

Page

## Cases:

|   |                          |
|---|--------------------------|
| Beauharnais v. Illinois, 343 U.S. 250 .....                       | 17                       |
| Browning v. Commonwealth, 116 Ky. 282,<br>76 S.W. 19 (1903) ..... | 10, 11, 16, 19           |
| Chaplinsky v. New Hampshire, 315 U.S. 568.....                    | 17                       |
| Cole v. Commonwealth, 222 Ky. 350,<br>300 S.W. 907 (1927) .....   | 12, 13, 15               |
| Commonwealth v. Duncan, 127 Ky. 47, 104 S.W. 997 (1907)----       | 11                       |
| Cox v. Louisiana, 379 U.S. 536 .....                              | 4                        |
| Garrison v. Louisiana, 379 U.S. 64.....                           | 5, 9, 17, 18, 19, 25, 27 |
| Keogh v. Pearson, 244 F. Supp. 482.....                           | 26                       |
| New York Times Co. v. Sullivan, 376 U.S. 254.....                 | 17, 25                   |
| Pennekamp v. Florida, 328 U.S. 331 .....                          | 16                       |
| Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895)---          | 9, 14, 15, 18            |
| Terminiello v. Chicago, 337 U.S. 1 .....                          | 16                       |
| Tracy v. Commonwealth, 87 Ky. 578, 9 S.W. 822 (1888)-----         | 7, 8                     |
| Winters v. New York, 333 U.S. 507 .....                           | 4                        |
| Yancey v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909)---       | 12, 15                   |

## Statutes:

|  |       |
|--|-------|
| Kentucky Constitution (1792), Article XII, Section 8 ..... | 6     |
| Kentucky Constitution (1891), Section 9 .....              | 6     |
| Kentucky Constitution (1891), Section 239 .....            | 8, 19 |
| Kentucky Constitution (1891), Section 228 .....            | 9     |
| Kentucky Revised Statutes, Section 431.075 .....           | 16    |

## Other authorities:

|  |    |
|--|----|
| Brandt, <i>Seditious Libel: Myth and Reality</i> , 39 N.Y.U.L.R. 1.....    | 5  |
| <i>Constitutionality of the Law of Criminal Libel</i> , 52 Col.L.R. 521--- | 5  |
| <i>Debates of the Kentucky Constitutional Convention of 1890</i> -----     | 6  |
| Kentucky Digest, Vol. 12A, pages 329-410 .....                             | 15 |
| Plucknett, <i>A Concise History of the Common Law</i> (5th Ed.)-----       | 5  |



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 619

---

STEVE ASHTON .....Petitioner

AGAINST

COMMONWEALTH OF KENTUCKY .....Respondent

---

## BRIEF FOR THE RESPONDENT

---

### STATEMENT OF THE CASE

Petitioner, Steve Ashton, was a student at Oberlin College in Ohio when he came to Hazard, Kentucky, in February of 1963 to give aid to striking miners. After a short stay in the community he composed and published under date of March 22, 1963 a pamphlet entitled "Notes On A Mountain Strike" (R. 127-137) in which he made libelous and defamatory statements regarding the Hazard Police Chief, the Sheriff of Perry County and a co-owner and publisher of the Hazard Herald newspaper. (R. 122, 123).

It was alleged that the chief of police had violated the law by taking a private job consisting of guarding a mine operator's home. It was also imputed to the police chief that he was connected with an alleged plot to kill the only pro-strike policeman on the Hazard force, which was foiled by the pickets who posted guard over the intended victim.

It was said of the sheriff that he was fined for intentionally blinding a boy with tear gas and beating him while he was locked in a jail cell with his hands cuffed, whereby the boy lost the sight of one eye. The sheriff was alleged to have offered the boy a large sum of money to keep the matter out of court. It was further alleged that the sheriff bought off a jury, and was fighting the pickets in the strike. Allegations regarding the owner of the newspaper imputed to her a breach of a public trust as to funds sent to the newspaper to be distributed among the pickets.

The statements about the police chief and the sheriff were shown to be substantially false and petitioner does not question the sufficiency of the proof of falsity as to the two officials. A question is raised regarding the truth of the statements concerning the newspaper publisher.

Petitioner was convicted in the Perry Circuit Court of the *common law crime of criminal libel* and his punishment fixed at a fine of \$3,000 and six months in jail. On June 18, 1965 his conviction was affirmed by a 4-3 vote of the Court of Appeals. (R. 144-158). The dissent of three judges was on the ground that:

"since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." (R. 158).

## SUMMARY OF ARGUMENT

1. Kentucky did not adopt the English common law of criminal libel. The holdings of the criminal libel cases decided by the Kentucky Court of Appeals establish the four essential elements of the common law offense in this state.

The Court of Appeals in this case recognized the fundamental requirements. The Kentucky opinions sufficiently define the conduct prohibited and indicate the conduct permitted, and the Kentucky common law crime is not unconstitutionally vague.

2. The "clear and present danger" test is not applicable to criminal libel. The Kentucky common law offense satisfies the relevant constitutional standards prescribed by this Court for libel prosecutions.

3. The Kentucky criminal libel law is designed to protect individual reputation. Defamation of public officials published with knowledge of falsity or a reckless disregard for the truth may constitutionally be punished as a crime. Although prevention of breach of the peace is no longer the basis for criminality, private libel should be subject to penal sanctions under the Kentucky common law in order to deter commission of harm disturbing the community's sense of security, such as malicious character assassination by publication of calculated falsehoods by impecunious persons.

4. The trial court properly defined the crime and its elements in instructions to the jury and the charge was not unconstitutionally vague. An additional instruction that criminal libel is a writing calculated to cause a breach of the peace fitted the evidence in this case. Such instruction was not necessary and was favorable to petitioner since it required an additional finding by the jury.

5. The Court of Appeals did not in its opinion in this case declare that it is unconstitutional to punish as a criminal libel a defamatory publication which has the effect of inciting a breach of the peace. Although the concept of disturbance of the peace is now obsolete, criminality under the Kentucky common law of libel was never based on the impact of the defamatory words. The trial court's instructions constituted a

narrower interpretation of the law than was necessary for conviction.

6. The statements made about Mrs. Nolan, the newspaper owner, were false.

7. There was sufficient evidence to justify a conclusion that the publication as to the officials was made with "actual malice" in that the statements were published with a reckless disregard for the truth.

8. There was sufficient evidence that the pamphlet was published.

9. Criminal sanctions are required where defamatory statements about the official conduct of officials are published with knowledge of falsity or an utter disregard for the truth.

## ARGUMENT

### POINT I

**A. THE KENTUCKY COMMON-LAW OFFENSE OF CRIMINAL LIBEL, AS DECLARED IN EARLIER CASES AND BY THE KENTUCKY COURT OF APPEALS IN THIS CASE, IS NOT UNCONSTITUTIONALLY VAGUE AND DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF THE PRESS IN PUNISHING EXPRESSION THAT DOES NOT PRESENT A SERIOUS AND IMMINENT DANGER TO THE COMMUNITY.**

Petitioner contends that the common law offense of criminal libel is unconstitutionally vague in that it has not been defined in such a manner that men of ordinary understanding can know with reasonable certainty the conduct condemned. *Winters v. New York*, 333 U.S. 507; *Cox v. Louisiana*, 379 U.S. 536. It may be assumed that a common

law crime must conform to the constitutional requirement of definiteness which has been applied to statutes, although, as the Court of Appeals noted, there is no case which has decided this particular point. (R. 146)

It has been stated that the offense of criminal libel did not originate as a part of the early common law but was created by the Court of the Star Chamber in England around the year 1600.

"The law of criminal libel, however, owes its origin not to the early common law but rather to an innovation in Star Chamber whereby elements of Roman law were employed as the basis for prosecuting the publishers of defamatory statements. Star Chamber reasoned that such defamations tended to cause breaches of the peace. Since the tendency to provoke a breach of the peace was regarded as the gist of the crime, whether the 'libel' was true or false was considered immaterial. In fact, it was reportedly said that 'the greater the truth the greater the libel,' the statement being justified on the ground that persons whose faults had been exposed were more likely to assault the publisher than were the victims of fictitious accusations.

In the latter part of the seventeenth century, following the abolition of Star Chamber, jurisdiction over criminal libel devolved upon the common law courts. . . ."<sup>1</sup>

Falsity of the defamatory words was not an element of the English common law crime and was not required to

<sup>1</sup>Constitutionality of the Law of Criminal Libel, 52 Columbia Law Review, 521, 522 (1952). *Garrison v. Louisiana*, 379 U. S. 64. A distinction was recognized between defamation of a public official, which was seditious libel punished as a scandalous attack on the government, and defamation of a private person in which the justification for the offense was the tendency of the words to incite a breach of the peace. Brandt, *Seditious Libel; Myth and Reality* 39 N.Y.U.L.R. 1 (1964); Plucknett, *A Concise History of the Common Law* (5th Ed.) p. 489.

be established for conviction. There was no right to present to a jury the vital question of whether the published matter was libelous. Malice was not an element of the offense, or at least was conclusively presumed.

The first constitution adopted by Kentucky when it became a state in 1792 altered the common law by providing that in all indictments for libel the jury shall have the right to determine the law and the facts, and the truth may be given in evidence in cases involving public officers or matter of public interest.<sup>2</sup> The same provision appears in the present state constitution.<sup>3</sup> The fact that libel adversely affecting an individual's reputation has never been regarded as a "trifling abuse of the right of expression"<sup>4</sup> is perhaps evidenced by the assertion made at the Constitutional Convention of 1890 that libel is "worse than murder."<sup>5</sup>

It is certain that the English common law offense of criminal libel was not adopted in Kentucky. Petitioner argues that the Kentucky common law crime has never been

---

<sup>2</sup>Kentucky Constitution, Article XII, §8 (1792).

<sup>3</sup>Kentucky Constitution, §9 (1891).

<sup>4</sup>Petitioner's brief, page 21.

<sup>5</sup>C. J. Bronston: "Is libel worse than murder?" "I answer the gentleman, in the presence of this intelligent audience, yes, it is worse than murder. You may kill a man and put him away beneath the sod, and there, over his mouldering body, may grow the green grass, and his children and grandchildren may come about and shed a tear; but take from him his reputation and he is a living corpse walking among men—a stench in their nostrils—a being subject to the scorn of the human race. Worse than murder; because the man who strikes down his fellow-man invokes at once the anger and determination of every human being to prosecute him; but let him, by the insidious means of the press, strike down a man's character, and the people have their prurient taste gratified for a moment, and then they forget, as it were, and leave the poor wretch to wander degraded throughout his life." Vol. I, Debates of the Kentucky Constitutional Convention of 1890, page 543.

adequately defined in the opinions of our highest state court so that a person of ordinary understanding could know the type of conduct prohibited. It is claimed there are varying definitions of the crime in the Kentucky cases, and that the decisions are not uniform or consistent in interpreting and applying the law as to this offense. In order to dispel any doubts arising from such assertions, it is necessary to review the cases decided by our Court of Appeals involving criminal libel.

In the first Kentucky case of record, *Tracy v. Commonwealth*, 87 Ky. 578, 9 S.W. 822 (1888), the validity of an indictment for criminal libel of public officials<sup>6</sup> was questioned on the ground that it did not meet the general requirement of the Criminal Code that acts constituting the offense must be stated in such a manner as to enable a person of ordinary understanding to know the nature of the crime charged. The indictment charged that defendant "willfully and maliciously composed, and caused to be printed and published of and concerning (the sheriff and circuit judge) certain false, scandalous and malicious libel", setting out the particular matter. The Court of Appeals upheld the indictment because the averments therein "constituted a complete offense" and apprised the defendant of every fact necessary to constitute the crime with which he stood charged.

It was thus made clear in 1888 that the common law

---

<sup>6</sup>Defendant was convicted and fined \$500 for causing to be published in a newspaper a libelous article regarding the sheriff which made him a corrupt official, and a statement regarding the circuit judge that his ruling in a certain condemnation case was "unjust and a disgrace to his position. He denied me the right of a trial by jury because he did not want it out of his hands, as he could not decide in favor of the railroad company, as he has done." The appellate court observed that "it is evident that the defendant, in publishing the libelous matter in which he maligned the judge and misrepresented his official conduct, went beyond the bounds of legitimate criticism. . . ."

offense of criminal libel in Kentucky was defined as the publication with malice of a false and defamatory writing constituting a libel per se. The essential elements of the offense were: (1) a writing defamatory per se, (2) publication, (3) falsity, and (4) malice. The Court in its opinion remarked that "the truth may be pleaded under our constitution and laws in justification of the offense."

In the *Tracy* case<sup>7</sup> the Court commented, in connection with whether different offenses were involved in a single publication:

"Libel is a public wrong. The publication is, in effect, a breach of the peace. It produces public mischief, and for that reason is an indictable offense. It is a breach of the peace, whether published as to one or more persons; the more persons affected by the libelous matter, the greater the public wrong; but the one act of publication is the libel complained of. . . ."

The view that it is presumed that publication of a libel will result in a breach of the peace may have been a reflection of the early common law rationale. On the other hand, the Court may have been taking note of existing conditions, since the framers of the present Kentucky constitution adopted in 1891 apparently believed breaches of the peace occurred often enough as a result of wounded honor, and constituted such a serious matter, that it was necessary to place in the Constitution an express prohibition against dueling.<sup>8</sup> Ken-

<sup>7</sup>*Tracy v. Commonwealth*, 87 Ky. 578, 9 S.W. 822 (1888).

<sup>8</sup>"Any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept or knowingly carry a challenge to any person or persons to fight in single combat, with a citizen of this State, with a deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth; and if said acts, or any of them, be committed within this State, the person or persons so committing them shall be further punished in such manner as the General Assembly may prescribe by law." Kentucky Constitution, § 239 (1891).

tucky officials even today must take an oath that they have not fought a duel or acted as second in a duel.<sup>8</sup>

In the next Kentucky case, *Smith v. Commonwealth*, 98 Ky. 437, 33 S.W. 419 (1895), the defendant did not question the definition of the offense or the sufficiency of the charge but asked a reversal of his conviction<sup>10</sup> on the grounds that the term "malice" was not used in instructing the jury, and the jury was not told to acquit if they had a reasonable doubt as to the truthfulness of the publication. It was held that the jury was properly instructed as to the element of malice where a finding of guilt was authorized if it was believed from the evidence that the material in the articles was wholly false and libelous, "and was so known to be false and libelous when published by the defendant." The opinion states:

"Certainly, to publish of and concerning an official false, defamatory, and libelous words, importing a felony and disgraceful and infamous practices, and known to be false and libelous by the publisher, and published by him for the sole purpose of injuring, scandalizing, and vilifying the officer, is conclusively malicious in fact as matter of law; and the jury was told that they must believe the publication was so made before they could find the accused guilty." (Emphasis ours.)

The decision in the *Smith* case equated knowledge of falsity with "malice", as concerns criminal libel of a public official. In this respect it is in accord with the holding of this Court in *Garrison v. Louisiana*, 379 U.S. 64. On the question of

<sup>8</sup>Kentucky Constitution, §228 (1891).

<sup>10</sup>Defendant was convicted of libel for publishing in his newspaper libelous and defamatory matter concerning the collector of internal revenue for the 5th district of Kentucky, which presented the official to the public "as a felon, a violator of the law and as being a degraded and unworthy man and official." A fine of \$877.50 was imposed, the odd figure being the result of a division by 12 of the estimates of the jurymen.

truth as a defense, the Kentucky Court held that the instructions were sufficient to set out defendant's absolute right to acquittal upon a showing of truth:

"In subsequent instructions, the jury were told that, if they believed the statements of the publication to be true, they must find the defendant not guilty . . . If the jury had entertained a doubt of the truth of the published statements, or been inclined to believe the publication to be true, they must have given the accused the benefit of it, and found him not guilty."

*Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903) involved a purely private libel totally unrelated to public affairs.<sup>11</sup> No question was raised concerning the definition of the offense or its elements, or the sufficiency of instructions as to these elements. The Court held that an allegation that a person will steal property if he has an opportunity is libelous per se, although not constituting a charge of commission of a crime:

"It does not require the imputation of a crime to render a publication libelous. Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published maliciously, are libelous. *Riley v. Lee*, 88 Ky. 603, 11 S.W. 713, 21 Am. St. Rep. 358; *Allen v. Wortham*, 89 Ky. 486, 13 S.W. 73. And the law is equally well settled that, where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society. 1 Starkie, 211. In *Duncan, etc., v. Brown*, 54 Ky. 186, it was held prima facie libelous

<sup>11</sup>Defendant was convicted under an indictment for criminal libel charging that he had written a letter to another person in which he requested the addressee to protect certain equipment because "Beard will purloin all of the outfit if he has a chance at it." The jury fixed the punishment at a fine of \$85.

to write and publish of one 'that he would put his name to anything that another would request him to sign that would injure a third person'."

In regard to defendant's claim of a privileged communication, the Court in the *Browning* case held that defendant had not attempted to show any facts which reasonably induced him to believe his property was in danger from Beard, and in any case a showing of malice apart from the act of publication overcame any such privilege.

In *Commonwealth v. Duncan*, 127 Ky. 47, 104 S.W. 997 (1907) the sole question presented was the sufficiency of an indictment charging that defendant maliciously wrote and caused to be published in a newspaper a certain article containing false and defamatory statements about a public official, all of which statements were known by the defendant to be false.<sup>12</sup> The indictment charged all the essential elements of the crime and was held sufficient. In regard to whether the published statements were libelous per se as to the particular official, the Court stated:

"The rule as to what is libelous is thus stated in 2 Roberson, Crim. Law, 586: 'Libel is an offense at common law, and is defined to be any false and malicious publication which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive or to bring him into contempt, hatred or ridicule, or which accuses him of any crime punishable by law, or of an act odious and disgraceful to society.' In 2 Bishop on Crim. Law, § 907, the offense is defined in these words: 'The offense of libel is founded on the doctrine of attempt. It is any

<sup>12</sup>Defendant caused an article to be published in a Lexington newspaper addressed to the grand jury in which it was stated that the clerk of the Fayette quarterly court had for four years been busily engaged in changing and falsifying the public records of the county to protect members of the fiscal court who were referred to as "the plunderers of the county." The trial court sustained a demurrer to the indictment and the Commonwealth appealed.

representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.' The publication in question certainly tended to bring Pearce into contempt and ridicule. It was manifestly calculated to create a disturbance of the public peace. . . ."

In *Yancey v. Commonwealth*, 135 Ky. 207, 122 S.W. 123 (1909) there was no question as to the definition or elements of the offense. The Court reversed a conviction of a county judge for criminal libel under an indictment charging that he maliciously sent letters to former members of a grand jury making false and libelous statements about the Commonwealth's attorney, which were known to be false at the time of publication.<sup>13</sup> Since the libelous publication was made in connection with an attempt to obtain support for a petition being circulated to have the Commonwealth's attorney impeached by the Legislature, on the basis of a belief in good faith that he was incompetent, it was held that in the absence of an allegation that defendant was acting without reasonable grounds the writings belonged to the class of communications regarded by the law as "absolutely privileged."

In *Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927) the only question raised on appeal was the sufficiency of three indictments charging that defendants had committed the offense of libel by maliciously publishing in a newspaper a certain article containing false and malicious statements about a circuit judge, for the purpose of injuring his good

---

<sup>13</sup>The letters mailed by the county judge asked that the recipients sign a petition or execute affidavits that while they were members of the grand jury the Commonwealth's attorney was "constantly and habitually drunk", had to be arrested and returned to the jury room to sign indictments, and "has continuously shown his incompetency and unfitness for the office." The jury found defendant guilty and imposed a fine of \$500.

name and fame as a public officer and citizen, and to expose him to public hatred.<sup>14</sup> The indictments were held sufficient since they charged the essential elements of a libel per se, falsity, and publication with malice. In discussing what constitutes libel per se, the Court stated:

"Libel is an offense at common law, and is defined to be any false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society. Commonwealth v. Duncan, 127 Ky. 47, 104 S.W. 997, 31 Ky. Law Rep. 1277. Language concerning one in office which imputes to him a want of integrity or misfeasance in his office, or a want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him as an officer, or charges him with a breach of some public trust, is actionable. Townsend on Slander and Libel, § 196; Dixon v. Chappell, 133 Ky. 663, 118 S.W. 929. . . ."

It should be noted that the Court in the *Cole* case acknowledged the right of the press and the public to criticize in a "caustic or severe" manner the acts of public officers, as a part of the privilege of fair comment, but pointed out that this did not apply to false and defamatory *statements of fact*:

"It is true that the interests of society and the efficiency of the public service require that the acts of all officers may be fairly criticized by the press

---

<sup>14</sup>The newspaper article alleged that the judge (later Governor of Kentucky) had assisted the Commonwealth attorneys and other citizens in securing evidence to convict three negroes charged in his court with rape, had called soldiers to be present and aid the court against defendants and would not give defendants a fair trial but would see that they were quickly convicted and speedily hanged regardless of the circumstances. Defendants admitted the falsity of the statements. Their punishment was fixed at a fine of \$250 each.

and the public. . . . if the publication is not a comment or criticism but a statement of fact, the rules to be applied are those applicable to any other case of defamation." (Emphasis ours)

The foregoing review of Kentucky criminal libel decisions leads to the conclusion that the offense was and is defined with such certainty that a person of ordinary understanding can comprehend the type of conduct condemned. While the opinions do not use identical language or cite the same authorities, and while different questions were presented, it is obvious from the holdings of the cases that the essential elements of the common law offense in Kentucky are: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice. In the only case in which the definition of the element of "malice" was questioned by the defendant<sup>15</sup>, it was held that in regard to publications concerning public officials and public affairs the actual malice required is shown by knowledge of falsity of the publication.

The Court of Appeals in its opinion in this case did not redefine the crime or change any of its elements, but merely restated in concise fashion the fundamental requirements of the offense as manifested by the earlier decisions. (R. 149).

The holdings in the Kentucky criminal libel cases are not inconsistent or contradictory, and it may be said that the common law crime has by a number of consistent interpretations of the Court of Appeals acquired a meaning sufficiently definite that all within its purview have a clear understanding of its application. The Kentucky opinions serve to establish that the conduct prohibited is the publication with malice of a false written statement which tends to blacken the memory of one who is dead or to degrade or injure one who is alive by imputing to him an act or condition which would bring him into public contempt, ridicule,

<sup>15</sup>Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895).

hatred or disgrace. And in regard to publications concerning public officials or public affairs actual malice must be shown by proof of knowledge of falsity of the statement or a high degree of awareness of its probable falsity.

The Kentucky opinions also serve to indicate the conduct which is permissible. The press and members of the public may comment upon and criticize the acts of public officials in a "caustic and severe" manner as a part of the privilege of fair comment.<sup>16</sup> The publication of a statement of fact which is defamatory per se is beyond the reach of the law if it can be shown to be true.<sup>17</sup> In connection with public affairs, a factual statement which is defamatory may be published with ill will if it is true, and even if it proves to be false the publisher has not been guilty of criminal libel unless he knew it was false when he published it or had a high degree of awareness of its probable falsity. There is also recognition of an absolute privilege.<sup>18</sup>

The common law offense of criminal libel may be said to be fairly broad as concerns the words which could be classified as defamatory per se. It is not possible to specify every combination of words which would by themselves tend to injure a person's reputation in the eyes of the public and thereby hurt him in society or in holding office or earning a livelihood. Although the particular words and combinations of words which would satisfy this element of the offense may be quite numerous and varied, this is not a new concept and has acquired a sufficiently definite meaning through a large number of common law decisions concerning what language is "actionable per se" in civil cases.<sup>18</sup> As to public officers generally, the definition in *Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927) furnishes an adequate

<sup>16</sup>*Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927).

<sup>17</sup>*Smith v. Commonwealth*, 98 Ky. 437, 33 S.W. 419 (1895).

<sup>18</sup>*Yancey v. Commonwealth*, 135 Ky. 207, 122 S.W. 123 (1909).

<sup>19</sup>Vol. 12 A, *Kentucky Digest*, 329-410.

standard for determining libel per se. Persons of ordinary intelligence are undoubtedly aware of whether what they are writing contains factual assertions which would bring another person into public contempt, ridicule or disgrace. And of course they can appreciate the difference between a truthful utterance and a lie.

It is admitted that some defamatory publications would not be as serious in impact as others. In the present case the defamation concerned public officials and was calculated to incite a breach of the peace when injected into the bitter and explosive miners versus coal operators situation prevailing at the time. This is in contrast with the private libel involved in *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903). However, the variance in the gravity of the offenses addresses itself to the discretion of the jury in fixing the punishment. Since this is a common law crime the jury under KRS 431.075 has a range of possible penalties extending from a fine of one dollar to the maximum sentence of a \$5,000 fine and twelve months in jail.

Petitioner maintains that communication cannot be punished unless it is of such character that its utterance would create a "serious and present or imminent danger" of substantive evil to the state or to the general welfare. *Pennekamp v. Florida*, 328 U.S. 331; *Terminiello v. Chicago*, 337 U.S. 1. It is argued that the Kentucky criminal libel law includes within its scope publications which are not likely to produce any harm to the public.

It is admitted that the Kentucky common law offense is designed to protect individual reputation. It is questionable whether it extends to "group libel". It is certain that it does not require proof that the publication tended to incite riots or public disturbances.

The "clear and present danger" standard is not applicable to the Kentucky criminal libel law since libelous communi-

cations are not within the protection of the First and Fourteenth Amendments. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 it was stated:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309-310."

And in *Beauharnais v. Illinois*, 343 U.S. 250, 266, Mr. Justice Frankfurter wrote for the Court:

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Merely no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

It cannot, of course, in view of the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 and *Garrison v. Louisiana*, 379 U.S. 64, be argued that it is sufficient to put a label of

"libel" on publications and permit punishment without satisfying relevant constitutional standards. However, the Kentucky common law crime satisfies the constitutional limitations noted by the Court in the *Garrison* case since truth is a complete defense in a prosecution for defamatory statements involving public officials and their conduct of public business. Also, "actual malice" with reference to statements relating to public officials has been defined by the Court of Appeals to mean knowledge of falsity, which would no doubt include the equivalent of reckless disregard for the truth. *Smith v. Commonwealth*, 98 Ky. 437, 33 S.W. 419 (1895).

The Court in *Garrison v. Louisiana*, 379 U.S. 64 recognized the validity of prosecutions for criminal libel involving publications concerning officials or public affairs, where statements libelous per se were published with knowledge of their falsity or with a reckless disregard for the truth. The justification for imposing criminal sanctions in cases of this type is the recognition that calculated falsehoods could be used as a tool to unseat a public servant or even topple the government.

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic govern-

ment and with the orderly manner in which economic, social or political change is to be effected. . . ."<sup>20</sup>

The Kentucky common law offense extends to purely private libels unrelated to public affairs.<sup>21</sup> The original justification for making libel as to private persons a crime was that publication of defamatory material tended to result in a breach of the peace. There is authority that in Kentucky this premise may have had some validity as late as the beginning of the Twentieth Century.<sup>22</sup> Although Kentuckians are by tradition a race of fighting and feuding men, it appears that the breach of the peace rationale has been put aside<sup>23</sup> and it is now clear that the only justification for imposing criminal sanctions for defamation of private parties is the protection of individual reputation.

The Court in *Garrison v. Louisiana*, 379 U.S. 64, 69-70, quoted with approval the explanation of the American Law Institute Reporters as to why the draft of the Model Penal Code omitted any criminal libel statute on the Louisiana pattern:

"It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions

<sup>20</sup>*Garrison v. Louisiana*, 379 U.S. 64 at 75.

<sup>21</sup>*Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903).

<sup>22</sup>Kentucky Constitution, §239 (1891).

<sup>23</sup>Opinion of the Court of Appeals, R. 150: "the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a 'breach of the peace' or to induce others to commit a public offense."

and the near desuetude of private criminal libel legislation in this country . . . ”

The view that private libel and personal calumny is no longer appropriate for penal control is unsound. A civil suit for damages may be an adequate threat to deter deliberate or reckless character assassination on the part of responsible publishers of means, but it cannot serve to guarantee relief from this positive evil in the case of those who are immune to judgments by virtue of being of insufficient worth. It surely cannot be true that the community's sense of security is not disturbed today by the thought that any member in private life could have his reputation intentionally, maliciously and systematically demolished by a succession of calculated falsehoods published by impecunious wrongdoers. The threat of the remedy immediately and inexpensively available by a criminal prosecution is an effective deterrent to the commission of such real harm. It has not, of course, been put to much actual use and probably will always be rare. But the mere shadow of the criminal sanction serves a worthwhile purpose in this type of case. We cannot say that wrongful actions can no longer be punished as a crime simply because statistics show there have been few prosecutions.

**B. THE INSTRUCTIONS TO THE JURY IN THIS CASE PRESENTED ALL THE ELEMENTS OF THE OFFENSE AND PROPERLY DEFINED THE CRIME. THE INSTRUCTION THAT CRIMINAL LIBEL IS A WRITING CALCULATED TO CREATE DISTURBANCES OF THE PEACE WAS FAVORABLE TO PETITIONER.**

The trial court in its instructions to the jury required it to believe from the evidence beyond a reasonable doubt that the prosecution had proved the essential elements of publication, falsity and malice. (R. 126). In the principal

instruction the court informed the jury that it must believe that the particular statements and words in the article were libelous, in that the chief of police, sheriff and newspaper owner were presented to the public as a felon, a violator of the law and as being degraded and unworthy persons, and were held up to public ridicule and contempt. (R. 123, 125). All of the essential elements of the crime were thus presented to the jury and the instructions defined the crime in accordance with previous opinions of the Court of Appeals.

It might be noted that the jury was instructed that truth of the statements was an absolute defense, and that they must find from the evidence that the statements in the articles and the legitimate inferences to be drawn therefrom were not only false and libelous but "was so known to be false and libelous when published by the defendant." (R. 125).

Petitioner's complaint regarding the unconstitutionality of the charge to the jury is based on the third instruction (R. 125) which reads:

"The court further instructs the jury that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."

The instruction fitted the evidence in this case in that the particular writing and circumstances under which it was published were such as to show that it was calculated to create disturbances of the peace or lead to unlawful acts. The pamphlet styled "Notes On A Mountain Strike" is replete with references to the violence implicit in the labor controversy in Perry County.<sup>24</sup>

<sup>24</sup>" . . . all kinds of artillery—pistols, high powered rifles, and, in one car, a machine gun! . . . Last month 4 pickets were shot while on the picket line at one mine . . . Since then the pickets have armed themselves . . . And even with the arms there is the danger of dynamite . . . I saw the remains of a picket leader's home which was blown up." (R. 134).

The purpose of the publication was to induce readers to choose which side of the controversy they favored and to take action in pursuance of their choice.

"The old union song is now reality here—'Which side are you on, boys? . . .' Sides are being chosen for the showdown, which is on the way and not far off." (R. 135).

In presenting the relative merits of the contesting factions, petitioner described the striking miners as good people who desired only to earn enough to feed and clothe their families. It was alleged that the strikers were being subjected to monstrous abuses by the unconscionable mine owners who were supported in their illegal acts by the sheriff, the city and state police, and even the FBI.<sup>25</sup>

There can be no doubt that the publication was calculated to promote disturbances and align neutral persons with the strikers against the allegedly corrupt forces of the law.

The effect of the instruction to which petitioner objects is that even if the jury found that the statements were defamatory per se, false and published with malice, they could not consider the offense proved unless they further found that the material was calculated to create a disturbance of the peace, etc. The possible impact of the defamatory words is not required to be shown under the holdings of the Kentucky cases. The instruction favored petitioner since it

---

<sup>25</sup> ". . . the operators cheat each miner out of at least \$10 a day . . . The operators consider mules and ponies to be more valuable than men . . . death threats to any worker who tries to organize . . . many brutal beatings . . . These men have been threatened and intimidated by operators and their gun-thugs. There is a price of \$8,000 on the heads of the strike leaders . . . The Sheriff, State Police, City Police have proven that they are either operators themselves (as is the High Sheriff) or in cahoots with them. The gun-thugs and operators are murderous and crooked men who have starved men to death, and their families with them . . . the FBI has been here intimidating and harassing the pickets." (R. 130-135).

required the jury to find something which was not necessary to be established in order to return a verdict of guilty. Criminality under the Kentucky law is not based on the tendency of the published material to incite public disorders.

## POINT II

**THE CRIMINAL LIBEL LAW AS APPLIED BY THE TRIAL COURT WAS CONSTITUTIONAL. THE AFFIRMANCE OF PETITIONER'S CONVICTION WAS NOT UNDER A DIFFERENT INTERPRETATION OF THE LAW THAN THAT GIVEN IN THE TRIAL COURT'S CHARGE TO THE JURY.**

The argument that the Kentucky common law offense of criminal libel is constitutional has been made under Point I-A. The trial court properly presented to the jury the four essential elements of the crime.

The Court of Appeals did not change the law by its opinion in this case or rule that the offense as defined by the trial court was unconstitutional. It merely restated the elements shown to be essential by previous decisions. It cannot be contended that the appellate court held that it was unconstitutional to give an instruction relative to the tendency of the defamatory material to cause a breach of the peace. The trial court's instructions more narrowly defined the crime than was necessary.

## POINT III

**THERE WAS SUFFICIENT EVIDENCE THAT THE STATEMENTS MADE ABOUT MRS. NOLAN WERE FALSE.**

The portion of the publication concerning Mrs. W. P. Nolan (R. 123) alleges in substance that she and her news-

paper were guilty of a violation of a public trust in that, because of her vehement feelings against labor, she refused to give to the striking miners the food and clothing which had been received by her newspaper for their express benefit. It was asserted as a fact that (1) all of the aid received by the newspaper was supposed to be delivered to the pickets, (2) Mrs. Nolan was vehemently against labor, (3) because of her feelings against labor she saw to it that none of the food and clothing was given to the pickets and (4) the food and clothes are either still under lock and key or have been given out to the scabs.

There was sufficient evidence that the statements made about Mrs. Nolan were false. The funds and material that came to the newspaper were not earmarked solely for the benefit of the pickets. People sending in the contributions did not mention the miners and simply said "Help the needy people." (R. 57). Various committees distributed the money, food and clothing upon the basis of need, and at the request of the Governor prorated it among several counties. (R. 50, 54). None of the needy people were asked whether they were a picket or a scab. (R. 52).

Mrs. Nolan denied that she was ever vehemently against labor. (R. 62). Her newspaper had always tried to keep down violence and promote harmony in the community. (R. 68). The statement that "none of the food and clothes" went to the pickets was false. Mrs. Nolan testified that she received fourteen truckloads of food and clothing and the pickets got all of two truckloads at the outset. (R. 65). Many of the pickets would go right in the warehouse and help themselves to food and clothing. (R. 51). All of the clothing was distributed to needy people (R. 51) except some old clothes in the warehouse that nobody wanted. (R. 55).

**POINT IV**

**THERE WAS SUFFICIENT EVIDENCE THAT THE STATEMENTS ABOUT THE CHIEF OF POLICE AND THE SHERIFF WERE MADE WITH ACTUAL MALICE CONSISTING OF A RECKLESS DISREGARD FOR THE TRUTH.**

The holdings of *New York Times v. Sullivan*, 376 U.S. 254 and *Garrison v. Louisiana*, 379 U.S. 64 require for actual malice a showing of knowledge of falsity of the material published or that it was published with a reckless disregard for the truth.

The evidence in this case is sufficient to establish that petitioner made statements about the public officials with a reckless disregard for the truth and is chargeable with a high degree of awareness of their probable falsity.

The particular statements regarding the sheriff and chief of police must be considered in proper context by considering the nature of the pamphlet, "Notes On A Mountain Strike." It is evident from the tone of the publication and the many reckless assertions set out therein that the writer was not interested in the truth, but was incorporating anything and everything that might serve to make the reader cast his lot with the strikers against the operators and peace officers.

Petitioner was not a resident of Kentucky and was a stranger to the community subject to stress by a labor-capital struggle. He came to support the pickets and associated only with this faction. He obtained his information from the strikers without bothering to question anyone else, much less the parties defamed. He did a part of the work on his publication in the home of the leader of the pickets, Herb Stacy, which adjoined a beer tavern. (R. 25).

Petitioner was an intelligent, educated man who must

surely have been highly aware of the probable falsity of a number of cruel and scandalous statements which he made in "Notes On A Mountain Strike." It is clear that since the defamatory statements served his purpose he did not care whether they were true or false.

It was stated in *Keogh v. Pearson*, 244 F. Supp. 482, 485:

"As defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing, tends to recklessly have disregard for the truth. . . . There would be a time in which the publisher would be forced to investigate the truthfulness of obviously defamatory material."

#### POINT V

#### **THERE WAS SUFFICIENT EVIDENCE THAT PETITIONER PUBLISHED THE LIBELOUS MATTER.**

The record shows that petitioner not only wrote but mechanically reproduced the libelous pamphlet bearing the date March 22, 1963 in large quantities, and had prepared copies for mailing to numerous people. (R. 28).

Specific evidence of publication is found in the testimony of City Policeman C. W. Begley who on the night of March 26, 1963 was making a routine inspection of beer taverns with Sergeant Cook when they entered Stacy's Tavern and saw petitioner and four or five others grouped around a table which had some pamphlets on it. Officer Cook saw the pamphlets and asked what they were and petitioner said "reading material." Petitioner then asked Begley if he would like to have one, and when Begley assented, petitioner got a copy out from under the table and handed it to him. Cook was also given a copy. Begley stated that petitioner

"was free to give them to us. Wanted us to take one and read it." (R. 80).

The officers returned to the police station after their evening patrol and when Chief Luttrell came on duty the following morning he was shown a copy of the pamphlet which caused him to send Officer Asher to Stacy's Tavern to see if additional copies could be obtained. (R. 87). Asher testified that a copy was given to him voluntarily when he asked "Do you care if I have one?" (R. 89, Q. 10).

The evidence is sufficient to establish that petitioner was sitting at a table in a public tavern stapling together copies of "Notes On A Mountain Strike" and distributing prepared copies to anyone who came into the tavern and expressed curiosity as to what the pamphlet might be about. Petitioner voluntarily gave copies of the pamphlet to the officers and urged them to read it. There can be no question about there being proof of publication.

## POINT VI

**IN ORDER TO PROTECT DEDICATED PUBLIC SERVANTS FROM BEING UNSEATED AND THE GOVERNMENT FROM BEING TOPPLED BY CALCULATED FALSEHOODS, CRIMINAL SANCTIONS MUST BE APPLICABLE TO DEFAMATORY STATEMENTS CONCERNING PUBLIC OFFICERS PUBLISHED WITH KNOWLEDGE OF FALSITY OR RECKLESS DISREGARD FOR THE TRUTH.**

The prevailing view of this Court set forth in *Garrison v. Louisiana*, 379 U.S. 64 is that calculated falsehoods do not further the fruitful exercise of the right of free speech, and the known lie deliberately published about a public official does not enjoy constitutional protection. This concept is

and must be sound if we are to be protected against use of the "big lie technique" used in propaganda, by which outrageous lies are ultimately accepted by the public as true if asserted often enough and loudly enough. As the Court noted, at the time of adoption of the First Amendment there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to topple an administration.

## CONCLUSION

The judgment of the Court of Appeals should be sustained since the Kentucky common law of criminal libel is sufficiently defined in prior opinions to enable a person of ordinary understanding to know with reasonable certainty the conduct prohibited. The Kentucky common law offense satisfies the relevant constitutional standards prescribed by this Court in criminal libel cases.

The trial court's definition of the crime in its instructions to the jury was in accordance with the basic requirements set out in prior opinions of the Court of Appeals, and was not unconstitutionally vague. The trial court instructed on a narrower interpretation of the crime than was necessary for conviction, and petitioner was favored in this respect.

There was sufficient evidence to establish the elements of actual malice and publication. The statements concerning Mrs. Nolan were false.

This Court should not depart from its ruling that criminal sanctions may be imposed for defamatory publications concerning public officials which were known to be false when published or were published with a reckless disregard for the truth.

April 9, 1966.

Respectfully submitted,

ROBERT MATTHEWS  
ATTORNEY GENERAL

BY

JOHN B. BROWNING  
ASSISTANT ATTORNEY GENERAL  
COUNSEL FOR RESPONDENT

1

11

# SUPREME COURT OF THE UNITED STATES

No. 619.—OCTOBER TERM, 1965.

|                           |   |   |
|---------------------------|---|---|
| Steve Ashton, Petitioner, | } | On Writ of Certiorari to the<br>Court of Appeals of the<br>Commonwealth of Ken-<br>tucky. |
| v.                        |   |   |
| Kentucky.                 |   |   |

[May 16, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was sentenced to six months in prison and fined \$3,000 for printing a pamphlet found to be prohibited by the common law of criminal libel in Kentucky. The Kentucky Court of Appeals, with three judges dissenting, affirmed petitioner's conviction. — Ky. —. We granted certiorari (382 U. S. 971) and reverse.

Petitioner went to Hazard, Kentucky in 1963, where a bitter labor dispute raged, to appeal for food, clothing and aid for unemployed miners. The challenged pamphlet, which had a limited circulation, stated concerning Sam L. Luttrell, Chief of Police of Hazard:

"Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for \$100 a week. Its against the law for a peace officer to take private jobs."

It said concerning Charles E. Combs, the Sheriff:

"The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them

hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined \$5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy \$75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants \$200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gunpoint.”

And it said respecting Mrs. W. P. Nolan, co-owner of the *Hazard Herald*:

“The town newspaper, the *Hazard Herald*, has hollered that ‘the commies have come to the mountains of Kentucky’ and are leading the strike. The *Herald* was the recipient of over \$14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the *Hazard Herald*, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only \$1100 of the money has come to the pickets, and none of the food and

clothes. They are now either still under lock and key, or have been given out to the scabs and others still."

The indictment charged "the offense of criminal libel" committed "by publishing a false and malicious publication which tends to degrade or injure" the three named persons. The trial court charged that "criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."

The court also charged that malice is "an essential element of this offense" and falsity as well.

The Court of Appeals in affirming the judgment of conviction adopted a different definition of the offense of criminal libel from that given the jury by the trial court. It ruled that the element of breach of the peace was no longer a constitutional basis for imposing criminal liability. It held that the common-law crime of criminal libel in Kentucky is "the publication of a defamatory statement about another which is false, with malice."

We indicated in *Shuttlesworth v. Birmingham*, 382 U. S. 87, that where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act as the trial took place under the unconstitutional construction of the Act. We think that principle applies here. Petitioner was tried and convicted according to the trial court's understanding of Kentucky law, which defined the offense as "any writing calculated to create disturbances of the peace . . . ."

We agree with the dissenters in the Court of Appeals who stated that: ". . . since the English common law of criminal libel is inconsistent with constitutional pro-

visions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky."

The case is close to *Cantwell v. Connecticut*, 310 U. S. 296, involving a conviction of the common-law crime of inciting a breach of the peace. The accused was charged with having played in the hearing of Catholics in a public place a phonograph record attacking their religion and church. In reversing we said: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. . . . Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Id.*, at 308.

In *Terminiello v. Chicago*, 337 U. S. 1, we held unconstitutional an ordinance which as construed punished an utterance as a breach of the peace "if it stirs the public to anger, incites dispute, brings about a condition of unrest, or creates a disturbance." *Id.*, at 3. We set aside the conviction saying:

"The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

"Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." (*Id.*, at 4.)

Convictions for "breach of the peace" where the offense was imprecisely defined were similarly reversed in *Edwards v. South Carolina*, 372 U. S. 229, 236-238, and *Cox v. Louisiana*, 379 U. S. 536, 551-552. These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel "makes a man criminal simply because his neighbors have no self control and cannot refrain from violence." Chafee, *Free Speech in the United States* (1941), p. 151.

Here as in the cases discussed above we deal with First Amendment rights. Vague laws in any area suffer a constitutional infirmity.<sup>1</sup> When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police

---

<sup>1</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 216; *Collins v. Kentucky*, 234 U. S. 634; *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Smith v. Cahoon*, 283 U. S. 565; *Champlin Refining Co. v. Commission*, 286 U. S. 210; *Lanzetta v. New Jersey*, 306 U. S. 451; *Wright v. Georgia*, 373 U. S. 284; *Giaccio v. Pennsylvania*, 382 U. S. 399. Cf. *Scull v. Virginia*, 359 U. S. 344; *Raley v. Ohio*, 360 U. S. 423.

power, freedom of speech or of the press suffer.<sup>2</sup> We said in *Cantwell v. Connecticut*, *supra*, that such a law must be "narrowly drawn to prevent the supposed evil" (310 U. S., at 307) and that a conviction for an utterance "based on a common law concept of the most general and undefined nature" (*id.*, at 308) could not stand.

All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as defined by Kentucky judges.

*Reversed.*

MR. JUSTICE HARLAN concurs in the result.

---

<sup>2</sup> *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507; *Smith v. California*, 361 U. S. 147; *Cramp v. Board of Public Instruction*, 368 U. S. 278; *NAACP v. Button*, 371 U. S. 415; *Baggett v. Bullitt*, 377 U. S. 360; *Dombrowski v. Pfister*, 380 U. S. 479.

